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IN THE

Supreme Court of the United States

October Term 1950

No. [redacted] 44

FRANK CAMPBELL LITTLETON, *Petitioner*

vs.

ROBERT H. McNEILL; COLEMAN C. GOBE; DAVID N. RUST; MARY W. RUST; HENRY S. MATHEWS; HELEN G. CAMPBELL; CAROLINE R. WILLIAMS; JOHN PAUL; BAYLOR METZGER, Administrator of the Estate of William A. Metzger; C. R. AHALT; ROLAND F. LEGARD; FLEET H. JAMES; FRANK E. SAUNDERS; ANNIE G. VON DEVENDER; ROBERT F. HERNDON; DANIEL F. BURNER,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION AND BRIEF

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CONTENTS

PAGE

PETITION

I Summary of the Matters Involved 2

1. The Issues 2

2. Statutory Law 3

3. Decisions of Courts Below 3

4. Applicable Facts and Procedures 4
"Oak Hill" 4
Farmer Debtor Proceedings 4
Sale of "Oak Hill" 4
Motion to Pay First Liens 4
The "Scheme of Distribution" 5
The Order of Distribution 5
All Proceeds Retained by Court 6
Attorney McNeill and Associate Purchase Note, Mortgages and Judgment against Client 6
Appraisers' Fees 7
Allowances to State Trustees 7
Allowance to Attorney for State Trustees 8
Sheriff's Fees 8

II

Statement of Basis of Jurisdiction 9

III

The Questions Presented 9

IV

Reasons for Allowance of Writ 11
Prayer 14

BRIEF

I

Report of Decisions Below 15

PAGE

II

Grounds Upon Which the Jurisdiction of this Court is Invoked 15

III

Statement of Case 15
"Oak Hill" 15
Farmer-Debtor Proceedings 15
Sale of "Oak Hill" 16
Motion to Pay all First Liens 16
"Scheme of Distribution" 16
Order of Distribution 16
All Monies Retained in Court 17
Attorney's Purchase of Secured Claim and Judgment 17
Appraiser's Fees 18
Allowance to State Court Trustees and their Attorneys 18
Sheriff's Fees 19

IV

Specification of Errors 19

V

Summary of Argument 21
Point One 21
Point Two 22
Point Three 22
Point Four 23
Point Five 23

VI

Argument 24
Point One—Specifications 1 & 2
The Facts 24
The Law 27
Point Two—Specifications 3 & 4
The Facts 33
The Law 34

PAGE

Point Three—Specifications 5 & 6
The Facts 36
The Law 37
Point Four—Specification 7
The Facts 38
The Law 38
Point Five—Specifications 8 & 9
The Facts 39
The Law 39

Conclusion 40

INDEX

Court Decisions

B

Baker v. Schofield, 243 U. S. 114 32
Berman v. Coakley, 243 Mass. 348, 137 N. E. 667 .. 31
Borchard v. California Bank, 310 U. S. 311 22

C

City of New York v. Saper, 336 U. S. 328 ..... 13, 20, 34
Codar v. Arts, 152 Fed. 943; 213 U. S. 233, 245 35
Commonwealth Finance Co. v. McHarg, 282 Fed. 560 (CCA 2) 12, 19, 30

D

Dillard v. Serpell, 138 Va. 694 ..... 14, 20, 37
In re Dunn, 205 N. Y. 398; 98 N. E. 914 31

E

Emery v. Parrott, 107 Mass. 95, 103 32

F

In re Fidler, 172 F 2d 635 14

H

Heffern v. Jayne, 31 Ind. 463, 465 31
Himely v. Rose, 5 Cranch (US) 313 35

I

PAGE

In re Dunn, 205 N. Y. 389; 98 N. E. 914 31
In re Fidler, 172 F. 2d, 635..... 14
In re Kaufman, 21 F. 2d. 799..... 14, 21, 39
In re Paschal (Texas v. White) 10 Wall. 483 ..... 12, 19, 29

J

Jackson v. Smith, 254 U. S. 587..... 13, 19, 31
J. H. Lane and Co. v. Maple Cotton Mill, 232 Fed. 421 32

K

In re Kaufman, 21 F. 2d. 799..... 14, 21, 39
1 Kings Bench (Eng.) 242, Annotated Cases 1916 E, 434 28

L

Lane, J. H. & Co. v. Maple Cotton Mill Co., 232 Fed. 421 32
Lomita Land & Water Co. v. Robinson, 154 Cal. 36 32

M

Magrouder v. Drury, 235 U. S. 106, 119, 120 32
Michaud v. Girod, 4 How. 551..... 12, 19, 29, 32

N

Neihart v. Buck, 90 F. 2d. 367 (CCA 10)..... 12, 19, 30
New York v. Saper, 336 U. S. 328 ..... 13, 20, 34

P

Parkenson v. Borst, 264 Fed. 761, 765 (CCA 5).... 29
In re Paschal, 10 Wall, 483 (Texas v. White) 12, 19, 29

R

Robertson v. Chapman, 152 U. S. 673, 681..... 32

S

Sexton v. Dreyfus, 219 U. S. 339, 344 ..... 13, 19, 34
Stockton v. Ford, 11 How. U. S. 232, 236..... 12, 19, 30

PAGE

T

Texas v. White (re Paschal), 10 Wall. 483.... 12, 19, 29

W

White Earth Creamery Co. v. Edmondson, 49 ND 394, 191 NW 662 30

Z

Zinc Carbonite Co. v. First Nat. Bank, 183 Wis. 124, 125 32

STATUTES

The Farmer-Debtor Law, Sec. 75 of the Bankruptcy Act; Title 11, Section 203, U. S. C. A..... 3, 15, 18, 34
Virginia Code, Section 5167..... 37
Judicial Code, Section 240 (a) Title 28, Sec. 1254, USC 9
Title 28, Section 2101 (c) USC 9, Sec. 8(a) Act Feb. 13, 1925 9

RULES and GENERAL ORDERS

General Order XLV..... 14, 21, 23, 39
Rules of Civil Procedure, Rule 73d..... 13, 20, 23, 38
Rules of Supreme Court, Rule 36, par. 2..... 13, 20, 23, 38

TEXTS

5 American Jurisprudence, "Attorneys at Law" Sec. 45, Sec. 58, Sec. 59..... 28
30 American Jurisprudence, "Interest" Sec. 53, page 44 35
6 Corpus Juris, page 683..... 28
7 Corpus Juris Secundum, "Attorney and Client," page 958, 957 28

IN THE

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No. .....

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ROBERT H. MCNEILL, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION

(The brief in support of this Petition begins at page 15 All emphasis in both Petition and Brief is supplied unless stated otherwise.)

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices, of the Supreme Court of the United States.

Your petitioner respectfully shows:

I

A SUMMARY STATEMENT OF THE MATTER INVOLVED

1. The Issues

First Issue. The courts below held that an attorney for a farmer debtor, who has been adjudicated a farmer debtor bankrupt, may purchase a pending secured claim against the farmer debtor, and thus become his creditor as well as being his legal counsel. The petitioner contends it is contrary to a long established rule of English and American jurisprudence that an attorney must not purchase a claim against his client.

Second Issue. The lower courts held that an attorney for a farmer debtor, who has been adjudicated a farmer debtor bankrupt, may pocket a profit from the purchase of a pending claim against his client. The petitioner contends that such profit, here 106%, being $19,840.27, inures to the client.

Third Issue. The lower courts held that one who knowingly joins with the attorney in purchasing a claim against his client may share in the profit made out of such purchase. The petitioner maintains that he may not.

Fourth Issue. Whether secured claims against a farmer debtor bankrupt bear interest after the date of the adjudication and if they do, whether they bear interest (a) after the sale of the security, or (b) after the proceeds are paid into court.

Fifth Issue. Whether a secured claim against the farmer debtor bears interest after the full amount secured is paid into court and the farmer debtor moves the court to pay such claim with interest to the date of the action.

Sixth Issue. Whether a trustee in a Virginia deed of trust (real estate mortgage) who did not execute the trust may recover any compensation or commission.

Seventh Issue. Whether an attorney for an individual who is both sole holder of a note secured by a deed of trust (real estate mortgage) and also trustee thereunder, may receive compensation for his services out of the security or other property of the grantor mortgagor.

Eighth Issue. When the property in controversy, is $45,954.52 in money and its disposition is the only question involved and there is held in the custody of the court $216,110.35, whether the court may decline to accept a supersedeas bond and withhold the entire $216,110.35 in lieu thereof, thus preventing disbursement of money which is not in controversy and the stopping of further claims for interest, etc., especially when the farmer debtor petitioner requested the disbursement thereof at the time the undisputed amounts due were determined.

Ninth Issue. Whether in a farmer debtor proceeding appraisers may be paid without any order of the court fixing the amount of compensation when there is no evidence of the amount of services rendered.

Tenth Issue. Whether in a farmer debtor proceeding the sheriff of a state court may be allowed compensation without any evidence to support a claim therefor.

2. The Statutory Law

The statute involved is Section 75 of the Bankruptcy Act; 11 USC 203, known as the Farmer Debtor Law, and such other portions of the Bankruptcy Act, 11 USC, as may be applicable.

3. The Decisions of the Courts Below

The opinion of the District Court is not reported. It appears at R 60A.

The opinion of the Court of Appeals is reported in 179 F 2d 848. It appears at R 118.

4. The Applicable Facts and Procedures

"OAK HILL"

Many years prior to 1941 Mr. Frank Campbell Littleton purchased "Oak Hill", the country residence estate of President James Monroe, in Loudoun County, Virginia, comprising about 1700 acres. R 9A, top of page. R 13A, paragraph (a). R 16A, seventh and eighth lines from the bottom. Opinion of District Judge at R 60A, beginning six lines down. R 118, second page of printed opinion of Court of Appeals second paragraph of opinion. In the Mansion House on this estate were assembled a great number of articles of historical significance. R 29A. R 61A, first sentence of last paragraph.

FARMER DEBTOR PROCEEDINGS

On June 19, 1941, Mr. Littleton filed his petition as farmer debtor in the District Court below under Sec. 75 of the Bankruptcy Act, being Title 11, Sec. 203, USC. R 46A, ninth line from the top.

SALE OF "OAK HILL"

In the course of administration of the proceedings the "Oak Hill" real estate was sold for $220,000.00 leaving $216,111.35 net after expenses were paid. This money came from the *real estate*. R 47A, paragraph at bottom of page, and top of R 48. The chattels, consisting of thousands of articles of historical value appraised at $21,612.00 were not sold. R 61A, first sentence of last paragraph. R 52A, the third short paragraph.

MOTION TO PAY ALL FIRST LIENS

On February 15, 1949 the farmer debtor, Mr. Littleton, filed his motion stating that the first trust lien creditors

had rendered a statement of all amounts due them to date, totaling $136,788.14, and moving that said first liens be paid in full in the amounts claimed by them so that interest would stop accruing. R 8A. As shown in the next paragraph below in this statement, the Order of Distribution of the proceeds of the real estate entered by the court showed more than $23,000.00 in the hands of the court in excess of all claims, costs and expenses. R 74A to 76A. That is there was $23,000.00 more than enough to pay all debts, costs and expenses.

The court took no action upon this motion, indicating by his letter to counsel on February 21, 1949 (R 10A) that notwithstanding that not only was there plenty of money to pay the first liens in full but also to pay all debts, he would nevertheless order a meeting of all interested creditors to determine the amount due each of them and submit a "scheme of distribution." That order is at R 11A. Thus the interest continued to run on all of the $136,788.14 first liens until the Order of Distribution.

THE "SCHEME OF DISTRIBUTION"

Pursuant to the order at R 11A, referred to in the preceding paragraph, the conciliation commissioner after a creditors meeting filed his "Scheme of Distribution" on April 13, 1949. R 47A. This included certain payments of $4800.00 to himself and the payment of all costs and expenses out of the sale of the "Oak Hill" real estate. It showed a balance of $21,506.08 remaining to be paid to the farmer debtor, Mr. Littleton.

THE ORDER OF DISTRIBUTION

The Order of Distribution of the proceeds of the real estate based upon the conciliation commissioner's "Scheme of Distribution" provided for all debts and all costs and expenses, and showed a remaining balance of $23,595.47 to be paid to Mr. Littleton the farmer debtor. R 76A,

paragraph (Q). The Court of Appeals reduced the costs and expenses by $3666.53, thus increasing the amount remaining out of the proceeds of the real estate to $27,262.00, over and above all debts, costs and expenses. (And this left intact and unsold the chattels appraised at $21,612.00. R 61A, first sentence of last paragraph. R 52A, the third short paragraph.)

ALL PROCEEDS RETAINED BY COURT

In the appeal by the farmer debtor, Mr. Littleton, the parties moved the District Court to fix a supersedeas bond to be executed by him. Instead the court ordered the entire amount of the proceeds of the real estate to be retained in the registry of the court "pending the outcome of the appeal herein," and that the surplus over the "debts, interest and costs" be held "in lieu of" a supersedeas bond". R 79A to 80A.

ATTORNEY McNEILL AND COLEMAN C. GORE PURCHASE THE NOTES, MORTGAGES AND JUDGMENT AGAINST ATTORNEY McNEILL'S CLIENT, MR. LITTLETON, SR.

(Note. It is important to an understanding of this subject to know that two Frank C. Littletons are involved (1) Frank C. Littleton, sometimes referred to as Frank C. Littleton, Sr., and (2) Frank C. Littleton, Jr.).

Among the claims against the farmer debtor Frank C. Littleton, there was a non-negotiable note secured by two mortgages, namely a second mortgage on the "Oak Hill" real estate and a first mortgage on the "Oak Hill" chattels, also a judgment against him. Both claims were owned by Frank C. Littleton, Jr. The principal of the note was $27,200.92 and the judgment was for $1,844.38. R. 85. This note and judgment were ordered paid in full by the District Court in the total sum of $38,440.27 (note $38,406.26; balance then due on judgment $34.01). R. 75A.

On appeal this allowance was affirmed. Opinion of Court of Appeals. R 128 to R 133.

This payment of $38,440.27 was ordered to be made, not to Frank C. Littleton, Jr. the original owner, but to Robert H. McNeill, (the attorney for the petitioner, Frank C. Littleton, Sr.) and Coleman C. Gore. R. 75A, item F (1) (2). It had been assigned to them by Frank C. Littleton, Jr. on February 5, 1948 for $18,600.00. R 16A. This purchase price was a little more than 48% of the client's debt, making a profit of $19,840.27 or 106% of an investment of $18,600.00 for fifteen months.

APPRAISERS' FEES

In the order of distribution six appraisers were ordered to be paid a total of $750.00 for appraising real estate and chattels. R 74A, Item A, (1) to (6). The farmer debtor promptly filed his objections to these payments stating: (1) no basis or rate of compensation was ever set by the conciliation commissioner or by the court, (2) the fees of $100.00 and $150.00 each was extravagant and (3) no claim or proof was filed or presented to the conciliation commissioner at the hearing ordered by the judge. These statements were never controverted. R 54A, Section I.

ALLOWANCES TO TRUSTEES IN STATE COURT

The Order of Distribution allowed $1000.00 to a trustee under the deed of trust. R 75A, Item D. This was for services in the State proceedings in which the trust was never executed. The farmer debtor objected to such payment for the reasons: (1) such a trustee's compensation is conditioned upon a sale of the security and there was no sale, and (2) no claim for such compensation was filed. R 56A, Section III. These statements were not denied.

ALLOWANCE TO ATTORNEY FOR TRUSTEES IN STATE PROCEEDINGS

Two trustees were named in the deed of trust. One of them, Rust, was the sole owner of the note secured by the trust. Both started foreclosure in state proceedings which proceedings were stopped upon objection of the mortgagor (grantor). This trustee then resigned and the other trustee (mortgagee) proceeded with the foreclosure until stopped by the filing of the mortgagor's petition as a farmer debtor in the federal court. The "Scheme of Distribution" recommended for the attorney for these trustees a fee of $500.00 for representing both trustees in the state court. R 50A, Item 17. The Order of Distribution allowed it. R 75A, Section (E). The farmer debtor objected to this payment upon the ground that the attorney's representation in the state court of the sole note holder and at the same time the trustee was inconsistent and therefore not compensable. R 56A, Section IV.

SHERIFF'S FEES

In the federal court trustees were appointed to make sale of the "Oak Hill" real estate. Upon their report of sale, the court ordered $673.00 to be paid to the state sheriff. R 2A, Item 5. The conciliation commissioner in his "Scheme of Distribution" recommended and the Order of Distribution allowed $50.00 to the same sheriff "as per bill attached" for "protection" of the property before the "trustees took charge" R 51A, Item 21. The farmer debtor objected to this allowance because there was no evidence of any such services. R 57A, Section VI. The statement that this $50.00 was in addition to the $673.00 is found in the court's statement at R 70A, Section VI.

II

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT

The jurisdiction of this Court is conferred by Title 28 USC, Section 1254. (Formerly Section 240 (a) of the Judicial Code, 28 USC, Section 347 (a), as printed on page 5 of the Appendix to the Revised Rules of this Court.)

The petitioner has complied with Title 28 USC, Section 2101 (c). (Formerly Section 8 (a) of the Act of February 13, 1925; 28 USC, Section 350, as printed on page 7 of the Appendix to the Revised Rules of this Court.)

The judgment of the court below was entered on January 12, 1950, and was final on that date. This petition for certiorari is filed in compliance with said statute.

III

THE QUESTIONS PRESENTED

This petition for certiorari presents the following questions:

1

May the attorney for a client purchase a secured claim against his client when the security is the property of the client and both client and security are involved in a bankruptcy court in farmer debtor proceedings, and thus at the same time be attorney for the client and own an acquired claim against his client?

2

May such attorney reap the profit from his investment, here 106%, being $19,840.27 within fifteen months, profit, or must he account to his client for such profit?

3

May one who was associated with such attorney in purchasing said secured claim pocket his profit, or must he account to his associate's client?

4

In a farmer debtor proceeding do secured claims bear interest after adjudication, and if so does the interest run either after the sale of the security, or after the deposit of the proceeds into court?

5

If a farmer debtor moves the court to pay undisputed secured claims and the money to pay such claims has been realized from the sale of the security and is in the possession of the court, may the court continue to hold the money and allow interest to run?

6

In farmer debtor proceedings may the trustee in a Virginia deed of trust (real estate mortgage) who did not execute his trust by selling the security, be paid any compensation or commission by the court of bankruptcy in a farmer debtor proceeding?

7

If the trustee named in a deed of trust (real estate mortgage) is sole owner of the security, may his attorney in a case involving objections to his exercising such office of trustee be paid for legal services out of the security or other property of the grantor-mortgagor in a farmer debtor proceeding in a federal court?

8

When the amount in controversy in an appeal from a District Court is $45,954.52 and there is $216,110.35 held

in the possession of the court, may the District Court decline to grant the motion of the parties to fix a supersedeas bond and hold the entire $216,110.35, thus preventing disbursement of the money not in controversy, and permitting the running of interest, especially when the appellant debtor has requested the payment of such sum not in controversy?

9

In a farmer debtor proceeding may appraisers be paid without any order of the court fixing their rate or amount of compensation when there is no evidence of the amount of services rendered?

10

May a sheriff of a state court be allowed compensation by a bankruptcy court in a farmer debtor proceeding without any evidence to support a claim for services?

IV

Reasons For Allowance of the Writ

1

The courts below approved the purchase by an attorney of a secured claim against his client when the claim, the security, his client and the vendor of the claim were all involved in the case in which he represented his client and they awarded a profit of 106% on the principal investment of $18,600.00 for the acquisition of $38,408.36 ordered paid within 15 months after the purchase.

This secured debt was $27,200.92, dated February 4, 1941, at 5% interest. When purchased on February 5, 1948, the amount due was $36,720 and when ordered paid in full as of May 1, 1949, it was $38,406.26. R 50A. Item 18, to which must be added $34.01, in Item 19. Also R 75A, Item F (1) and (2).

This was a profit of over 106% or $19,840.27 on the investment of $18,600.00 for 15 months in the client's debt on which interest meanwhile kept accruing on the $27,200.92. When the claim was bought the attorney and his associate knew the security was ample and the investment was safe. For full discussion see the brief filed herewith at page 24, last paragraph; page 25, first three paragraphs.

These decisions below are counter to the long established rule in Anglo-American jurisprudence that an attorney may not buy up claims against his client and if he does, he may not reap a profit. He holds any profit as trustee for his client.

These decisions in the Fourth Circuit are contrary to the decisions of Courts of Appeals in other Circuits, including the Second and Tenth Circuits. See *Niehart* v. *Buek*, 50 F 2d 367, CCA 10. *Commonwealth Finance Co.* v. *McHarg*, 282 Fed. 560, CCA 2.

They run counter to the most solemn declarations of this court upon the delicate and confidential relations between counsel and client and the duty of counsel and courts to see that they must be zealously guarded. *Texas* v. *White* (*in re Paschal*) 10 Wall. 483, in the middle of the last paragraph of the opinion. *Stockton* v. *Ford*, 11 How. 232, 236. *Michoud* v. *Girod*, 4 How. 551.

This is a question that in the interest of the integrity of the bar and the confidence of the public should be settled by this court. No more solemn duty rests upon bench and bar than to maintain the high standing of the relationships between attorney and client.

2

The decisions below are counter to the decisions of numerous federal and state courts holding that if an

attorney reaps a profit from investment in claims against his client, he holds it as trustee for his client and must account for it. The Second and the Tenth Federal Circuits, in the cases just cited above, are examples of such holdings.

3

Of course the courts below were in error, and against the current of the law, in permitting the attorney's associate to participate with the attorney in the wrongful gain. *Jackson* v. *Smith*, 254 US 587.

4

The important question of whether, and if so when, interest shall be paid upon claims, especially secured claims, after adjudication in a bankruptcy court should be settled by this court. The law generally is no. *Sexton* v. *Dreyfus*, 219 US 339, 344. *City of New York* v. *Saper*, 336 US 328. Here not only was interest permitted to run after adjudication but long after the money to pay the claims, interest and all costs was paid into court, and even after the debtor moved the court to pay them and stop the running of interest. The district court continued to hold such money long after the time for appeal expired, and still holds it.

5

This court should determine the important question of whether a court may hold large sums of money not in controversy when there is ample other money in court to pay all debts and costs. This is particularly true when the parties have requested the court by motion to fix supersedeas bond and thus release all funds. Such withholding of funds is contrary to, and in violation of, Rule 36, paragraph 2, of the Rules of this Court and Rule 73 (d) of the Rules of Federal Procedure promulgated by this court.

This is a matter of great importance to the public and should be decided by this court.

6

It is a matter of interest to the public whether a trustee in a Virginia deed of trust (mortgage), who did not execute the trust, may be paid out of the security. *Dillard* v. *Serpelly,* 138 Va. 694.

7

It is a matter of public interest whether an attorney for a trustee, named in a deed of trust in which the named trustee is sole owner and holder of the secured note, may be paid a fee out of the security.

8

It is also a matter of interest to the public whether appraisers and a sheriff of a state court may be paid without any order fixing compensation or evidence of services. Both the statute, federal court decisions and rules have fixed strict procedures pertaining thereto for the protection of the public. General Order XLV in Bankruptcy of this Court. *In re Kaufman,* 21 F 2d 799. *In re Fidler,* 172 F 2d 635. *Dillard* v. *Serpell,* 138 Va. 694, 703.

Your petitioner accordingly prays that a writ of certiorari issue to the Court of Appeals for the 4th Circuit directing it to certify and send to this court a transcript of the record and of the proceedings thereon so this cause may be finally determined by this court, and for all other proper relief.

Washington
April 10, 1950

Elmer McClain,
Lima, Ohio,
Counsel for Petitioner.

Edgar Allen Prichard
Fairfax, Virginia,
Of Counsel.

BRIEF

In Support of the Foregoing Petition for Writ of Certiorari

I

Report of the Decisions Below

The opinion below is reported in 179 F 2d 848. It appears at R 118.

The opinion of the District Court is not reported. It appears at R 74A.

II

Grounds Upon Which the Jurisdiction of this Court Is Invoked

The basis for the jurisdiction of this court has been set forth at page 9 of the preceding Petition for a Writ of Certiorari.

III

Statement of the Case

"OAK HILL"

Some years prior to 1941 the petitioner, Mr. Littleton, purchased the country estate of President Monroe comprising over 1700 acres in Loudoun County, Virginia, 35 miles from Washington. R 9A, R 13A paragraph (a). R 16A, Opinion of District Judge at R 61A. Mr. Littleton collected and furnished the Mansion House with many articles of great historical value. R 29A. R 61A.

FARMER DEBTOR PROCEEDINGS

In 1941 Mr. Littleton filed a petition as a farmer debtor in the District Court, at Alexandria, Virginia under Sec. 75 of the Bankruptcy Act; Title 11, Sec. 203, USC. R 46A.

SALE OF "OAK HILL"

In 1948 the "Oak Hill" real estate was sold for $220,000.00. After paying the expenses of sale $216,111.35 remained. R 47A to 48A. The chattels, chiefly the historical objects, were not sold; they were appraised at $21,612.00. The opinion of District Judge at R 61A.

PETITIONER'S MOTION TO PAY FIRST LIENS

Upon obtaining a statement of all first liens the petitioner moved in the District Court that they all, amounting $136,788.14, be paid to stop interest. R 8A. It is shown in the Record that there was then over $23,000.00 paid into Court from sale of the real estate security over and above all claims, costs and expenses. R 74A to 76A. It was not done. Instead the court asked the conciliation commissioner to submit a "Scheme of Distribution" in the Order at R 11A. The interest meanwhile has continued to run on the entire $136,788.14 of first liens with plenty of money in court to pay them and all costs and expenses and leave over $23,000.00 besides.

THE "SCHEME OF DISTRIBUTION"

In compliance with the Order the conciliation commissioner submitted his "Scheme of Distribution" which included $4800.00 to himself and payment of all claims, costs and expenses, leaving $21,506.08 remaining to be paid to the petitioner, Mr. Littleton. R 47A. R 52A, last item before total.

THE ORDER OF DISTRIBUTION

Upon considering the "Scheme of Distribution" the District Court by its "Order of Distribution" providing for all claims, costs and expenses found $23,595.47 left to be paid to the petitioner, Mr. Littleton. R 76A, paragraph Q. The Court of Appeals reduced the costs and expenses

by $3666.53 leaving more than $27,000.00 due Mr. Littleton. (Opinion of Court of Appeals: R 118).

This still left intact and free of all liens all of the chattels appraised at $21,612.00. R 52A, second indented paragraph.

ALL MONEYS RETAINED IN COURT

After Notice of Appeal the parties moved the District Court to fix a supersedeas bond to be executed by the petitioner, Mr. Littleton. But the Court ordered the entire amount of money held in Court, $216,111.35, to remain in Court "pending the outcome of the appeal herein" and that the surplus over and above "debts, interests, and costs" be held "in lieu of a supersedeas bond". R 79A to 80A. The effect of the order was to tie up $136,788.14 that was the property of the first secured creditors and not in dispute—not involved in the appeal. R 78A. R 74A to 76A.

ATTORNEY'S PURCHASE OF SECURED CLAIM AND JUDGMENT AGAINST HIS CLIENT

Two Frank C. Littletons, Sr. and Jr., are here involved. It is necessary to distinguish them.

Littleton, Jr., held a secured claim for a non-negotiable note secured by a second real estate mortgage on "Oak Hill" and a first chattel mortgage on all the chattels; he also held a judgment. Not counting interest they totaled $29,045.30. R 2A. And as of May 1, 1949 they totaled $38,440.27 ($38,406.26 plus $34.01). R 75A, Item (F). This was ordered paid by the District Court. R 75A, Item F. It was sustained by the Court of Appeals. R 118.

Fifteen months prior to the Order of Distribution, that is on February 5, 1948 the attorney for the petitioner, the farmer debtor Mr. Littleton, Sr., and the attorney's associate purchased the secured claim and the judgment for $16,800.00 from the son, Mr. Littleton, Jr. R 16A. This

$16,800.00 was just over 48% of the $38,440.27 ordered paid and showed a profit of 106%, or $19,840.27 on the investment, for a period of fifteen months.

APPRAISERS' FEES

The Order of Distribution provided $750.00 for six appraisers of real estate and chattels. R 74A to 75A, Items A (1) to (6). The petitioner filed objections on the ground that (1) no compensation was ever fixed by either the conciliation commissioner or the judge, (2) and the fees of $100.00 and $150.00 each were extravagant and (3) no proof was ever presented. These statements were not questioned. R 54A, Section I.

ALLOWANCES TO TRUSTEES AND THEIR ATTORNEY IN STATE COURT

The Order of Distribution allowed $1000.00 to a trustee named in the deed of trust (mortgage) in the state proceedings never earned because the trust was never executed. The petitioner's objections, (1) that such compensation is conditioned upon sale of the security which never occurred as the proceedings were stayed by the federal jurisdiction under Sec. 75 (n) and (o), and (2) no application for such services was made. R 54A, Section III. These statements were not denied.

The attorney for the trustees in the state proceedings was allowed a $500.00 fee. This was for representation of one trustee who was the sole owner of the note secured by the trust and who upon objection in the state court resigned, and for the other trustee whose attempt at foreclosure was defeated by the federal jurisdiction under Sec. 75 (n) and (o). Both the conciliation commissioner, the District Court and the Court of Appeals allowed this $500.00 fee. R 75A, Items D and E. R 118. The objection of the petitioner that the representative of the sole note holder and the trustee was inconsistent was overruled. R 56A, Sections III and IV.

SHERIFF'S FEES

Upon the report of sale of the real estate the District Court allowed and there was paid $673.00 to the state sheriff. R 2A, Item 5. The conciliation commissioner recommended, the District Court allowed and the Court of Appeals approved $50.00 additional. R 51A, Item 21. R 70, Section VI. The petitioner's objection that there was no evidence of any additional services by the sheriff was overruled. R 57A. R 70A, Sec. VI.

IV

Specification of Errors

1

The Court of Appeals erred in holding that an attorney may purchase a claim against his client in the proceedings in which he represents his client, and that the attorney may pocket the profit therefrom, here $19,840.27 being 106% of $18,600.00 invested for fifteen months.

These holdings are in direct conflict with the contrary holdings of other Circuits, particularly the Second and Tenth *in Commonwealth McHarg,* 282 Fed. 560, CCA 2, and *Niehart* v. *Buek,* 50 F 2d 367, CCA 10, and the solemn declarations of this court. *Texas* v. *White* (*In re Paschal*), 10 Wall. 483, in the middle of the last paragraph of the opinion. *Stockton* v. *Ford,* 11 How. 232, 236. *Michoud* v. *Girod,* 4 How. 551. *Jackson* v. *Smith,* 254 US 587.

2

The Court of Appeals erred in holding that the attorney's associate in the purchase of the claim against the client may share in the profits of the investment. *Jackson* v. *Smith,* 254 US 587.

3

The Court of Appeals erred in holding that secured claims against a farmer debtor bankrupt bear interest after adjudication and after the sale of the security and the proceeds are paid into court. *Sexton* v. *Dreyfus*, 219 US 339, 334. *City of New York* v. *Saper*, 336 US 328.

4

The Court of Appeals erred in holding that after the farmer debtor moves to pay secured claims in full out of available monies amply sufficient lying in the registry of the court they continue to bear interest. Rule 36, paragraph 2, Rules of this Court. Rule 73d, Rules of Civil Procedure.

5

The Court of Appeals erred in holding that the trustee in a Virginia deed of trust (mortgage) who did not execute the trust may nevertheless be paid a commission or compensation out of the security. *Dillard* v. *Serpell*, 138 Va. 694.

6

The Court of Appeals erred in holding that an attorney for a trustee named in a Virginia deed of trust (mortgage), who is the sole holder of the note secured by the trust, may be paid a fee out of the security.

7

The Court of Appeals erred in holding that when the only controversy on appeal is the disposition of $45,954.52 in money the court may continue to hold all of the money deposited in court, amounting to $216,110.35 in lieu of a supersedeas bond which the parties have moved the court to fix, thus preventing the disbursement of $136,788.14 not in controversy which would stop the running of in-

terest. Rule 36, paragraph 2, of the Rules of this court and Rule 73d of the Rules of Civil Procedure.

8

The Court of Appeals erred in holding that appraisers in a farmer debtor proceeding may be paid without any order of the court or any evidence of the amount of services performed. General Order XLV. *Re Kaufman, Inc.*, 21 F 2d 799.

9

The Court of Appeals erred in holding that the sheriff of a state court may be paid without any evidence of services rendered.

V

SUMMARY OF THE ARGUMENT

1

Summary of Point One

PURCHASE BY ATTORNEY AND ASSOCIATE OF CLAIM AGAINST HIS CLIENT

(Specifications 1 and 2)

An attorney may not buy up a claim against his client and pocket the profit from his investment.

The relationship between attorney and client is a highly fiduciary one of trust, of a very delicate, exacting and confidential nature, requiring the highest degree of fidelity and good faith. It is a relation of great responsibility and often of hardship.

If he does buy up a claim against his client and there is a profit, he holds the profit for the client.

The associate of an attorney in such a venture may not keep any share of the profit.

2

Summary of Point Two

INTEREST ON SECURED CLAIMS

(Specifications 3 and 4)

Interest is paid by a borrower for the use of money. When the money is paid into court the borrower's obligation to pay interest ceases because he has no longer any control of it. The borrower has no control and no responsibility. The lender must look to the court and the court does not pay interest.

Over and above this, when the debtor informs the court there is no controversy over the statement rendered by the lender and requests that the secured claims be paid, certainly it is not equity to keep charging interest against him. The principle is essentially like that in *Borchard* v. *California Bank*, 310 US 311. Here the mortgage holder could have had his money, but thought it more profitable let let his money draw 5½%.

3

Summary of Point Three

(Specifications 5 and 6)

PAYING TRUSTEE IN DEED OF TRUST AND HIS ATTORNEY

Of two trustees named in the Virginia deed of trust, one was the sole note holder and was compelled to resign. The other initiated sale of the real estate "Oak Hill" in foreclosure but never sold it. The attorney for both trustees claims a fee.

The Virginia law bases the compensation of the trustee in a deed of trust upon the sale of the security. No sale was made and no compensation or fee can be awarded.

4

Summary of Point Four

(Specification 7)

THE COURT MAY NOT HOLD MONEY NOT IN ISSUE IN LIEU OF A SUPERSEDEAS BOND

The parties moved the court to fix the amount of the supersedeas bond upon appeal to be paid by the appellant. Instead of doing so, the court decreed that all of the funds in court, amounting to $216,111.35 be retained whereas $136,788.15 was not involved in the appeal and the appellant and first creditors agreed on the amount due them and the debtor moved the court to pay them.

Such failure to fix a supersedeas bond violates Rule 36, paragraph 2 of the Rules of this Court and also violates Rule 73 d of the Rules of Civil Procedure.

5

Summary of Point Five

(Specifications 8 and 9)

BANKRUPTCY COURT MAY NOT PAY APPRAISERS WITHOUT ORDER OR EVIDENCE NOR MAY A SHERIFF BE PAID WITHOUT PROOF OF SERVICE

General Order XLV requires specific provision for the compensation of appraisers to be made in the order appointing them and a sheriff who has already been compensated cannot be repeatedly paid more money for services not proved to have been rendered.

VI

ARGUMENT

1

Argument of Point One

(Specifications 1 and 2)

PURCHASE BY ATTORNEY AND ASSOCIATE OF CLAIM AGAINST CLIENT

THE FACTS

Because of the great importance of this subject the facts under this heading are somewhat extensively reviewed.

Among the proved claims against Mr. Littleton in the farmer debtor case were two held by his son, Frank C. Littleton, Jr.

One was a non-negotiable note for $27,200.92 which was secured by two mortgages, namely a second mortgage against the "Oak Hill" real estate and a first mortgage against the historical objects in "Oak Hill" Mansion House. The other claim was a judgment for $1,844.38. R 84.

On February 5, 1948 Robert H. McNeill, who was Mr. Littleton Sr.'s attorney in the farmer debtor case, joined with Coleman C. Gore in purchasing these claims from the son for $18,600.00. R 92, second question and answer. They paid down only $5,000.00. The last payment was not made until September 18, 1948. Trustees' certificate: R 20A to 21A. R 14A, indented paragraph at end of page. This was 16 days *after* the sale of the real estate on September 2, 1948. R 27A. R 57A, paragraph 3 of section V. It sold then for $220,000.00 which was $23,595.47 more than *all* debts, costs and expenses of the estate. R 76A, item Q. And the chattels remained unsold. R 52A.

Order of Distribution

Fifteen months later, May 1, 1949, the date as of which these claims were ordered paid by the District Court, they amounted to $38,440.27. R 75A, item F. (Judgment $34.01, note $38,406.26, total $38,440.28.)

Attorney McNeill and his associate Gore had been considering the purchase of these two claims during the month before they bought them. The purchase occurred February 5, 1948. R 16A, Ex. A. Gore had the subject before him in December 1947 or January 1948, "Right along after Christmas time." R 15A, top of page. Gore interested McNeill in the deal in January and they then knew they could buy the claims for $18,600.00. R 95, first two questions and answers.

They knew the claims were amply secured, would be fully paid, and expected to make a profit. McNeill: "I thought I had a chance to make a profit." R 106, question and answer just before the words : "THE WITNESS". Gore: "I also discussed with him" (McNeill) "the fact that it was a first mortgage on the furniture and I felt there was ample value there to protect this note." R 98, second to last paragraph. On May 15, 1948 attorney McNeill's firm wrote the client that, "In your case it has developed that you have more than sufficient property to pay all debts." R 32A, second sentence in paragraph beginning: "The statute." Attorney McNeill on February 4, 1948, the day before the purchase, assured his client the obligation was worth 100 cents on the dollar. R 22A, just before paragraph 3.

Attorney McNeill and his associate Gore were familiar with the surrounding circumstances because they had worked for "months and months" to finance "Oak Hill", and although he denied it, Gore had been agent for Mr. Littleton Sr. in attempts to finance it. Gore: R 92, second question and answer after the words: "BY MR. STILL-

SON HALL." McNeill: R 110, first question and answer. Gore: R 90, the italicized paragraph near the *bottom* of the page.

The District Court and the Court of Appeals stressed the letter of February 4, 1948 addressed: "To Whom It May Concern", signed by Frank C. Littleton, Sr. That letter is at R 84. That letter was prepared by attorney McNeill and his associate Gore and presented to Mr. Littleton, Sr. for signature. It contains the words "or to purchase the same themselves", referring to McNeill and Gore, in a sentence reciting that it is made to enable McNeill and Gore to negotiate a sale. R 85, paragraph at top of page.

The testimony of attorney McNeill and Gore concerning the drafting of this letter is somewhat conflicting and indefinite. Gore: "A letter was drawn" . . . "and handed to Judge McNeill and myself" . . . R 89, italicized paragraph. Attorney McNeill: "I think he" (Gore) "dictated it in my outer office". R 101, last full paragraph on page. Gore: "I think I dictated the letter" . . . R 91, bottom of page. Mr. Littleton says his attorney, McNeill, dictated it. R 22A, 10th and 11th lines.

The next day, February 5, 1948, the purchase of the two claims from the son was consummated. R 16A.

There is no evidence that Mr. Littleton, Sr., was present when the contract of February 5, 1948 (R 16A) was drawn and signed. Gore says it was drafted by McNeill and himself in *Gore's office.* R 97, last question and answer on the page. Attorney McNeill says Gore dictated it. R 106, last question and answer on the page. And that Gore dictated it in attorney *McNeill's office.* R 101, last full paragraph on the page. Attorney Fuller, attorney McNeill's partner says: "*To my knowledge* he was" given a copy of the contract. "I am not sure whether he was present." R 108, bottom of page to top of page

R 109. "I say I *thought* he received a copy." R 109, middle of page.

The father, Mr. Littleton, Sr., the farmer debtor, did not then, or for a long time afterwards, know what the terms of the purchase were. He repeatedly wrote his attorney, McNeill, for full details without success. See "Debtor's Sworn Statement in Opposition," to the allowance of the claim beginning on R 21A, at R 23A where he states he did not know the details until March 14, 1949. His repeated requests for them are referred to at R 23A to 25A, paragraphs (a) to (j). The full letters are at R 27A, Ex. A to R 40, Ex. J.

Attorney McNeill says he told his client that if the client wanted detailed information he could get it from the son or from Gore. R 102, middle of page.

He failed to learn the price paid for the claims until the "Proof of Amount Due" Attorney McNeill and his associate Gore, executed March 14, 1949 (R 15A, bottom of page) was presented at the hearing before the Conciliation Commissioner on March 14, 1949. He then executed and filed, in the same month, his "Debtor's Sworn Statement in Opposition" to the allowance of that claim. R 21A.

THE LAW

The foregoing, somewhat extensive, factual account is presented because of the extreme importance to the public of the subject of law it presents.

It is a very zealously, and jealously, guarded principle of Anglo-American jurisprudence that a member of the bar shall not buy up claims against his client. The prescription is precisely the same as that against the judge on the bench. Both are much more strictly forbidding than the rule that every fiduciary is prohibited from speculating in the estate of his cestui que trust.

"The relation between attorney and client is highly

fiduciary in its nature and of a very delicate, exacting and confidential character requiring a very high degree of fidelity and good faith." 5 American Jurisprudence, "Attorneys at Law," Section 45.

Section 58: "It is contrary to the policy of the law, and also contrary to the principles of equity to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of advisor to his client concerning pending litigation threatening his title to his property and that of purchaser of such property in opposition to the title of his client."

The English version even forbids an attorney to receive an acknowledgment of an outlawed debt. 1 K B (Eng.) 242; Annotated Cases 1916E, 434.

7 Corpus Juris Secundum, "Attorney and Client" at page 958 quoting 6 Corpus Juris at page 683 says: "The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship."

"No rule is better settled than that an attorney cannot make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business to his own advantage or profit." 7 Corpus Juris Secundum, page 958. And at page 957: An attorney "occupies the position of the highest trust and confidence, so that, in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity, and fidelity, and if he does not, he is strictly liable or accountable to his client. He is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence."

5 American Jurisprudence, "Attorneys at Law," Section 59, page 294: "An attorney employed to sustain his client's right or title to property cannot purchase for him-

self any outstanding or opposing title against the interest of his client, either before or after the cause is ended, whether during the time the client holds for himself or after he has conveyed his interest; any such purchase will inure to the benefit of the client or his vendee or assignee. In such case the attorney can obtain, at most, no more than the sum actually paid by him for such property."

Parkerson v. *Borst*, 264 Fed. 761, CCA 5, page 765. "It is a principle of law, of universal application that all relations of agency are affected with a trust, and that of such relations none is more exacting in its requirements, nor compelling in the performance of them than the relation of attorney and client. English and American legal history points with unwavering fixity to the recognition at all times, and in all places of the necessity for the establishment and maintenance of the relation of attorney and client upon a basis of the utmost trust and confidence on the part of the client, and of the utmost fidelity and singleness of purpose on the part of counsel. In no relation is the scriptural maxim that no man can serve two masters, more rigidly enforced than in that of attorney and client, nor is there any relation where disregard of it more certainly nullifies the transaction." And filing a claim in bankruptcy and receiving dividends on it was no waiver or estoppel against the client.

Texas v. *White*, 10 Wall. (US) 483: "The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them, the client's interests must necessarily suffer."

Michoud v. *Girod*, 4 How. (US) 551 at 555: "And, therefore, if a trustee, though strictly honest, should buy for himself an estate from his cestui que trust, and then should sell it for more, according to the rules of a court of equity, from general policy, and *not from any peculiar imputation of fraud*, he would be held still to remain a

trustee to all intents and purposes, and not be permitted to sell it to or for himself."

Stockton v. *Ford,* 11 How. (US) 232, at 246: "There are few of the business relations of life involving a higher trust and confidence than that of an attorney or client, or, generally speaking, one more honorably or faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality or justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it."

Commonwealth Finance Company v. *McHarg,* 282 Fed. 560, CCA 2: Page 564: "But it is to be kept in mind that McHarg was not merely an agent or quasi trustee. *He was also plaintiff's attorney.* The law makes it the duty of an attorney to exercise in all his relations to his client the most scrupulous good faith and fidelity. He is bound to exercise the highest degree of honor, integrity and fidelity to his client's interest." (Citations) "The relation is one of peculiar and exceptional confidence, so much so that the courts have held that a *gift made by a client to his attorney* during the continuance of the relationship *to be absolutely void.*" (Citing cases)

Neihart v. *Buek,* 50 Fed. 2d 367, CCA 10: An attorney who had not been paid for legal services already rendered and whose client was unable to pay for services to be rendered received a deed from the client to a heavily encumbered farm as his fee. The attorney conducted the litigation and claimed the right to redeem the farm from mortgage. It was held that he held the deed as trustee and the right to redeem was in the heirs of the client.

White Earth Creamery Company v. *Edmondson,* 49 ND 394, 191 NW 662: An attorney for the Creamery Company bought an assignment a mortgage against his client. "His position required the exercise of the utmost good faith".

. . . "By purchasing such assignment of the mortgage he became a trustee for his client, the Creamery, subject only to a lien for such fees as might be due him." . . . "Properly the trial court determined the foreclosure to be illegal and void."

Heffern v. *Jayne,* 31 Ind. 463 at page 465: "An attorney acts in a fiduciary capacity. The relation between an attorney and his client is one of great confidence and the law imposes on the attorney the highest degree of good faith." Bankruptcy of the attorney does not discharge his obligation to return money held for his client.

Berman v. *Coakley,* 243 Mass. 348, 137 NE 667: "An attorney at law has been said to be a public officer. He is an officer of the court sworn to aid in the administration of justice and to act with all good fidelity both as to his clients and the court. The public have a deep and vital interest in his integrity." . . . "Public policy hardly can touch matters of more general concern than the maintenance of an untarnished standard of conduct by the attorney at law toward his client. The attorney and client do not deal with each other at arm's length." Referring to relation between attorney and client: "That relation is highly fiduciary in its nature."

In re Dunn, 205 NY 398; 98 NE 914: "That the relation between attorney and client is one of unusual character has been so often affirmed that a statement of the proposition is commonplace." The elements of trust and confidence and the undivided loyalty and devotion of the attorney "render the relationship a personal and confidential one and make its obligations on the part of the attorney of the most exacting kind."

Both attorney McNeill and Gore are jointly and severally liable for any profits in the transaction. This is definitely settled by the case of *Jackson* v. *Smith,* 254 US 587, where an attorney in a case and two laymen joined in a venture to invest in property to be bought by one of them

at a sale of the property involved in the case. There was no evidence of improper influence to prevent competition or to bring about the sale in preference to themselves over anyone else. The sale was fairly conducted; there was competitive bidding and their man was the highest bidder.

The court said through Justice Brandeis who delivered the opinion: "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker* v. *Schofield*, 243 US 114; *Robertson* v. *Chapman*, 152 US 673, 681. To this end it was his duty to endeavor to have the land, when sold under the trustee, bring the largest possible price. *J. H. Lane and Co.* v. *Maple Cotton Mill*, 232 Fed. Rep. 421. When he agreed with Smith and Wilson to join in the purchase, if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were or might be, antagonistic to his trust. *Michoud* v. *Girod*, 4 How. 503, 552. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. *Magruder* v. *Drury*, 235 US 106, 119, 120. Since he did not pursue it and profits resulted, the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not have been injured thereby*. *Magruder* v. *Drury*, 235 US 106. And others who knowingly joined a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. *Emery* v. *Parrott*, 107 Mass. 95, 103; *Zinc Carbonite Co.* v. *First National Bank*, 103 Wis. 125, 134; *Lomita Land & Water Co.* v. *Robinson*, 154 Calif. 36. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relations to the estate; the latter, without regard to the fact that he was also *counsel for the receiver.*"

The opinion of the District Judge and that in the Court

of Appeals dwelt upon the fact that the estate suffered no loss—that the debtor was not harmed. **That is not the point.**

When an attorney invests in a matter involved in his client's estate or in connection with his client's debts, from that moment his interest becomes divided and he can no longer serve his client's interests with singleness of purpose and wholehearted fidelity that his supreme loyalty to his client demands.

If the law of the longstanding principle that an attorney occupies a position of the highest trust and confidence, with a duty of great delicacy and responsibility towards his client, is to be watered down to an ex post facto judgment of his conduct based upon ultimate results, the door is open to callous disregard of that relationship. Attorneys and associates who are willing to "take a chance" will in some instances be whitewashed. Those who are lucky will be the exceptions that will be disregarded by those who are sure they can devise "the perfect crime."

No device could be more surely calculated to lower the high estate of bench and bar in public estimation.

2

Argument of Point Two

(Specifications 3 and 4)

THAT INTEREST ON SECURED CLAIMS SHOULD NOT RUN INDEFINITELY

THAT WHEN THERE ARE AMPLE FUNDS IN COURT, FREE OF ALL CONTROVERSY, UNDISPUTED CLAIMS SHOULD BE PAID TO STOP INTEREST

THE FACTS

The deed of trust note bore 5½% interest. R 49A, the long paragraph at the top of the page. This was at all

times during the proceedings, and still is, more than the market price of money.

The "Oak Hill" real estate was sold on September 2, 1948 for $220,000.00 which was adequate to pay all claims, costs and expenses and besides leave remaining $23,599.47 to be returned to the petitioner farmer debtor, Mr. Littleton. Order of Distribution, 76A, item Q. Date of Sale, R 27A, paragraph 7, R 57A, paragraph 3 of section V.

Mr. Littleton moved the court to pay all secured claims out of these proceeds so as to stop interest, stating that statements had been rendered by the creditors showing the whole total to be much less than the net proceeds of the sale of "Oak Hill." R 8A and 9A. Amount of secured claims: $136,788.14; net proceeds of sale: $116,277.21. R 11A, end of last full paragraph. Order of Distribution showing $216,111.35 including $23,595.47 refund to Mr. Littleton: R 76A, item Q and total.

THE LAW

This court a year ago in *City of New York* v. *Saper*, 336 US 328, quoted the widely accepted law as follows: "More than forty years ago Mr. Justice Holmes wrote for this court that the rule stopping interest at bankruptcy had been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. *Sexton* v. *Dreyfus*, 219 US 339, 344. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary."

It may be conceded that where, as here, there is ample security to pay principle and interest, interest will run as long as the farmer debtor has the use of the property under the farmer debtor law, section 75 of the Bankruptcy Act;

Title 11, section 203, which, contrary to general bankruptcy, keeps the property within the control of the debtor.

"Since interest is allowed usually on the theory that the debtor is in default and has the use of the claimant's money, the general rule is that when the fund is paid into court and cannot be paid out without an order of the court, such fund will not bear interest during the time it is within the custody of the court. Interest will not be allowed against the defendant in a foreclosure suit on the amount tendered and deposited in court." 30 American Jurisprudence, "Interest", page 44, section 53.

When the property was sold on September 2, 1948 a new situation arose; the debtor no longer had the property and the proceeds were taken over by the court.

The money derived from the sale of the property was placed in the registry on the court December 16, 1948. "Order": R 11A, in the middle of the second paragraph. This payment of the funds into the registry of the court was more than sufficient to pay the interest and the principal on the mortgage notes, and in excess of all claims in the case.

In *Himely* v. *Rose,* 5 Cranch (US) 313, Chief Justice Marshall said on the subject of interest at page 317: "If the money remains in the possesion of the court, it carries no interest."

In *Codar* v. *Arts,* 152 Fed. 943, the Court of Appeals held likewise and this court sustained it, saying in *Codar* v. *Arts,* 213 US 233, 245: "Nor do we think the Circuit Court of Appeals erred in holding that inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt," up to the time the proceeds of sale were paid into court.

No reason can be suggested why interest at 5½%, far above the market rate of money, should be kept running after the debtor put before the court the statement rendered by the secured creditors showing their total claims and requesting that they be paid to stop interest, there being no controversy over the amount.

3

Argument of Point Three

(Specifications 5 and 6)

THE FACTS

Two trustees were named in the deed of trust (mortgage of "Oak Hill"). They were Rust and Metzger. R 44A, paragraph 2. They advertised the security for sale in foreclosure in state proceedings. R 45A, paragraph 3. Upon objection by the debtor on the ground of self interest of Rust as trustee and improper advertisement, the sale was enjoined. R 45A, paragraph 3. R 65A, 5th line. The district court denied compensation to Rust. R 46A, last sentence at end of long paragraph.

Metzger proceeded again with foreclosure until the invocation of the federal jurisdiction. R 46A, end of paragraph at top of page.

The attorney for Rust and for Metzger in their trusteeship proceedings was A. R. Ahalt.

Metzger was awarded by the district court below $1,000.00 as trustee's compensation and Ahalt $500.00 for services to the trustees, all being for services in the state proceedings prior to the attachment of federal jurisdiction. Order of Distribution: R 75, items (D) (E). Opinion of District Court on Order of Distribution; R 63A, section 3.

The trustees named in the deed of trust never executed the trust. The only sale made was by other trustees

appointed in the Federal Court, Garrett and Smith. R 2A. They were ordered paid $1170.00 each, a total of $2340.00 for making sale. R 3A, items 9 and 10.

THE LAW

It would seem, on the face, that it is unlawful that two sets of trustees should each be paid for making sale of mortgage property when but one sale was made.

Indeed, the law of Virginia provides for compensation to a trustee named in a deed of trust only upon his making sale of the property: No sale, no compensation.

As said by the Supreme Court of Virginia as to a similar deed of trust in *Dillard* v. *Serpel,* 138 Va. 694, 703: "Stated succinctly, notwithstanding the general rule as to *active trust* the compensation of a trustee in such deeds as these is conditioned upon a sale of the property, and then is determined either by the contract or the deed itself, or by the Virginia statute which controls where there is no specific agreement."

There is no provision in the deed of trust for compensation or attorney's fees. On the contrary, the provisions of section 5167 of the Virginia Code are especially applicable. This provision is discussed in the *Dillard* v. *Serpel* case at page 701 where it is said the only provision for compensation of the trustee is in case he sells the property: "For this service, and for no other, this statute provides."

The Virginia Court further adopted the language of the trial judge as to the right of commissions as follows: Page 705: "There can be no compensation by way of commissions for the obvious reason that no sale has occurred."

The trustee under a deed of trust merely to secure the payment of a debt must rely for compensation either upon the statute or upon the contract expressed in the deed of trust. The mere advertising of the property for sale under

decree of a court is neither a part nor a complete execution of the trust and therefore the trustee is not entitled to compensation.

As to Ahalt who in the state court represented Rust who presumed to act as sole note holder and as trustee, and Metzger who never executed his trust, he was in an antagonistic and wholly inconsistent position. He could no more represent both the trustees and the creditor under the deed of trust than Mr. Rust could act as trustee for himself and as the sole creditor thereunder.

4

Argument of Point Four

(Specification 7)

The Court refused to fix a supersedeas bond and held $216,111.35 of which $136,788.14 was not appealed.

THE FACTS

Despite the motion of the parties to the court to fix a supersedeas bond to be met by the appellant, the court ordered all funds, "$216,110.35" (really $216,111.35) to be held. R 79A to 80A. The effect was to keep the entire $136,788.14 of first creditors' money in court thus depriving them of it and subjecting the debtor to further claims for interest in spite of the fact that he requested the court to pay it out as undisputed. R 8A.

THE LAW

It is the duty of the district court to fix a supersedeas bond on appeal. Rule 36, paragraph 2, of the Rules of this Court as well as Rule 73d of the Rules of Civil Procedure require the district court to set the bond on appeal.

5

Argument of Point Five

(Specifications 8 and 9)

A Bankruptcy Court May Not Pay Appraiser Without Order of Appointment Fixing Compensation

Nor May a Sheriff Be Paid Without Proof of Services Rendered

THE FACTS

Six appraisers in the district court were ordered paid a total of $750, or $100 to $150 each, for appraisal of real estate and chattels. R 78A, items (1) to (6). No order fixed the amount of compensation upon their employment.

The state sheriff was ordered paid $50 long after the case was under the federal jurisdiction and after he had already been paid $673 in the sale of the real estate. R 2A, item 5.

THE LAW

No compensation was fixed by the Conciliation Commissioner or the Judge in employing appraisers. General Order XLV reads: "No auctioneer or accountant shall be employed by a receiver or trustee except upon an order of the court expressly fixing the amount of the compensation or the rate thereof. *The compensation of the appraisers shall be provided for in like manner in the order appointing them.*"

Judge Thatcher in *In re Benjamin Kaufman, Inc.*, 21 Fed. 2d 799, said: "Unfortunately, the referee's order appointing the appraisers does not fix their compensation or the rate or measure thereof. General Order XLV requires that this be done in the order appointing them. I

do not see how the failure to comply with the general order can be overlooked without ignoring it entirely and defeating the practice which it prescribes. The allowance recommended for the appraisers must therefore be disallowed."

As to the sheriff, it is inconceivable why the federal court, provided with a United States Marshal, should pay a state sheriff $50 who has already been compensated $673 out of the funds from the sale of the real estate.

CONCLUSION

The writ should be allowed for these compelling reasons important to the public and important to the maintenance of unity in federal judicial holdings:

The decisions below would permit an attorney to speculate in the affairs of his client which were involved in the very proceedings in which the attorney represented his client.

They would permit the attorney not only to keep the profits of the violation of his trust and of his high fidelity to his client and share such profits with his associate.

They set a rule as to the running of interest in bankruptcy not sanctioned by this court and contrary to the principles enunciated consistently by this court over a long period.

They sanction the withholding by the courts of large sums not in dispute when creditors and debtor are ready to have them paid.

They sanction the payment of state trustees in deeds of trust and fees to their counsel who are not authorized by the state to be paid.

They countenance the payment to appraisers and to state sheriff without authority.

For all the reasons cited in the foregoing petition and brief, the petitioner prays for a writ to the Fourth Circuit.

ELMER MCCLAIN
Lima, Ohio
Counsel for the Petitioner

Washington
April 10, 1950

EDGAR ALLEN PRICHARD
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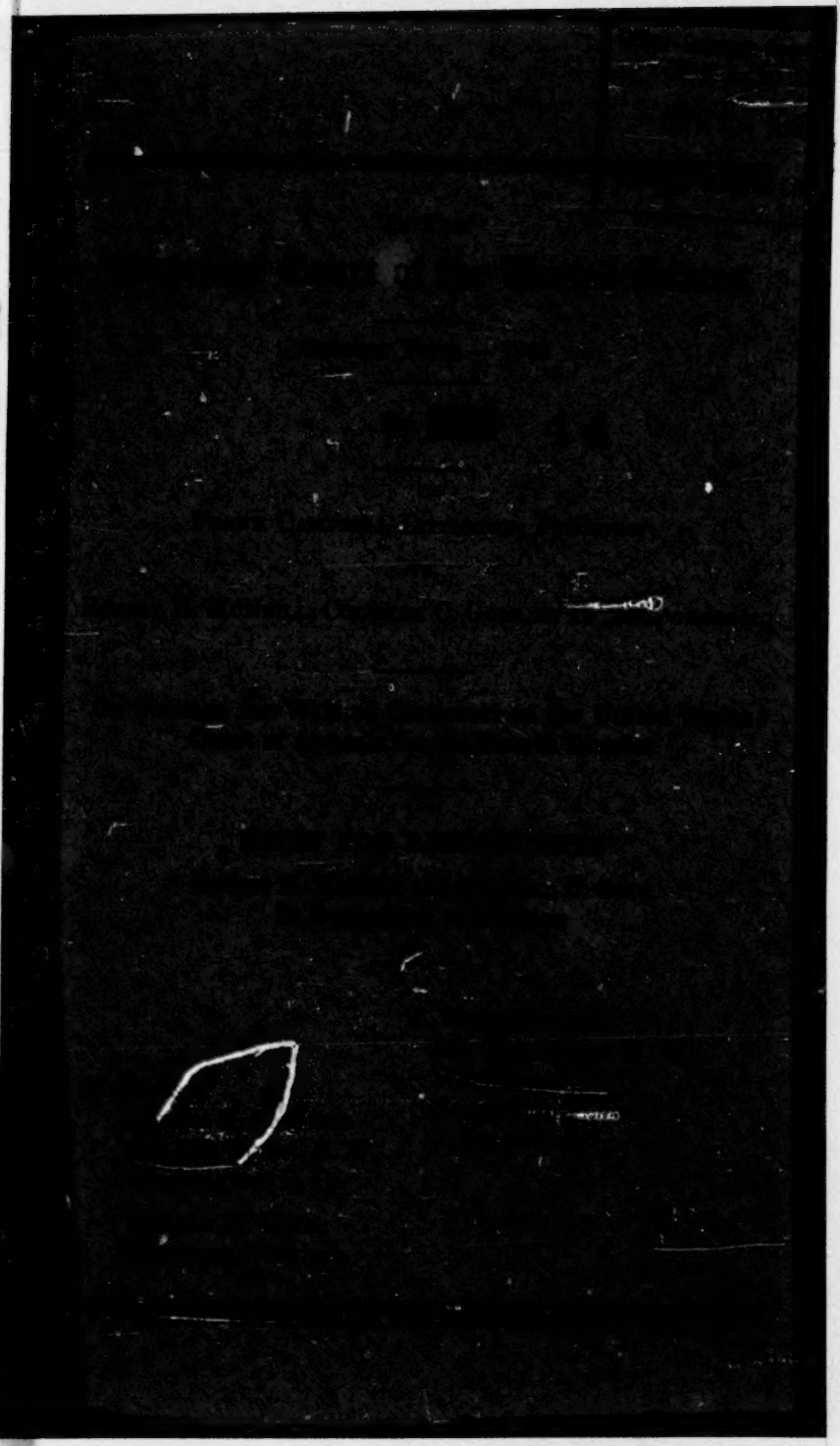
Of Counsel



INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2, 3

Statement 3-5

Argument

Petitioners Reasons For Allowing Writ Are Without Merit 5-7

Reply to Petitioner's Argument 7-9

The Law 9-14

Interest 14, 15

Conclusion 15

COURT DECISIONS

American Iron Co. v. Seaboard Air Line, 233 U. S. 261 14

Brown v. Leo, 2 Cir., 34 F 2d 127 15

Byars et al v. Stone, et al, 42 S. E. (2) 847 12

Commonwealth Finance Corp. v. McHarg, 282 Fed. 560 6

District of Columbia v. Pace, 320 U. S. 698, 702 7

In re Hopkins, D. C. R. I., 15 F 2d 206 15

Jackson v. Smith, 254 U. S. 587 7

Johnson v. Norris, 5 Cir., 190 F, 459 14

Littleton v. Kincaid, et al, 179 F 2d 848 ..... 1, 4, 5

Littleton v. Rust 166 F 2d 1007, cert. den, 334 U. S. 833 ..... 8, 13

Michand v. Girod, 4 How. 551 7

Muschany v. U. S., 324 U. S. 49 7

Miles v. Lindell, 8 Cir., 107 F 2d 729 15

Niehart v. Bulk, 50 F 2d 367, CCA 10 6

New York v. Saper, 336 U. S. 328, p. 330 14

PAGE

In re Norcor Mfg. Co., E. D. Wisc., 36 F. Supp. 978 15
Robertson v. Chapman, 152 U. S. 673 10
Stockton v. Ford, 11 How. 232, 236 6
Stiers v. Hall, 170 Va. 569 11
Texas v. White (in re Paschal) 10 Wall. 483, 19 L. ed 992 6
Welling v. General Industries Co., 330 U. S. 545-550 7

TEXTS

C. J. S. Vol. 7, Sec. 126, pages 961-962 11
C. J. S. Vol. 7 11
Am. Jur. Vol. 5, Sec. 62 ..... 10, 11
Am. Law Institute Agency, Secs. 390-392 10
Canon 22 and 6 of Professional and Judicial Ethics 10

STATUTES

28 U. S. C. Sec. 12354 2
11 U. S. C. Sec. 203 ..... 2, 3

IN THE

Supreme Court of the United States

October Term — 1949

No. 746

FRANK CAMPBELL LITTLETON, *Petitioner,*

vs.

ROBERT H. McNEILL, COLEMAN C. GORE, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth District

BRIEF FOR THE RESPONDENTS, ROBERT H. McNEILL AND COLEMAN C. GORE, IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the District Court is not reported. It is set forth at R. 60A.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 179 F 2d 848. It appears at R. 118.

JURISDICTION

The judgment of the court below was entered on January 12, 1950 (R. 118). The District Court's order on the mandate of the court below was entered on March 9, 1950, after the parties were furnished with a copy of the proposed order and duly notified that it would be presented at a hearing before Judge Hutcheson at Richmond, Virginia, on March 6, 1950. Counsel for the two respondents herein were the only attorneys who appeared at the hearing. Petitioner's motion to withhold distribution was denied by the District Court and his motion to withdraw the mandate was denied by the court below. Petitioner's application to this court filed on April 3, 1950 for recall and stay of mandate of the Court below, *in which he set forth the material facts and issues herein, was denied by Chief Justice Fred Vinson on April 4, 1950.*

The petition for a writ of certiorari was filed on April 12, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTION PRESENTED

Whether the court below properly affirmed the trial court which found that the respondents herein are entitled to recover the amount of their claim with interest thereon from February 4, 1941 against petitioner, as set forth in his farmer-debtor schedule in bankruptcy, which were duly proven and admitted to be true by petitioner, which claim was purchased by the respondents herein at petitioner's written request, and for his benefit and upon his earnest solicitation, and with his full knowledge of the purchase price and all of the other attending circumstances.

STATUTES INVOLVED

The statute which petitioner claims (p. 2) is involved "is Section 75 of the Bankruptcy Act; 11 USC 203, known

as the Farmer-Debtor Law, and such other portions of the Bankruptcy Act, 11 USC as may be applicable."

STATEMENT

The findings of the court below (R. 118), affirming the order of the District Court (R. 74A), which approved the Conciliation Commissioner's recommendations for distribution of assets of petitioner, the farmer-debtor (R. 47-A), may be summarized as follows:

Petitioner filed a petition as farmer-debtor under the Frazier-Lemke Act, 11 U. S. C. A. Sec. 203, et seq. on June 18, 1941 (Opinion below, p. 2; R. 119). Petitioner failed to rehabilitate himself and pay his creditors, but succeeded in preventing a sale of his real property by the trustees appointed by the court, until September 2, 1948, when said property was sold for $220,000, which was sufficient to pay all of the claims against the farmer-debtor, petitioner herein, with interest, as well as expenses of the proceedings, and to leave a surplus. The purchase price of the property was paid and deposited in the registry of the court on December 16, 1948 (Id. R. 120). Although petitioner at first filed objections to the sale, he soon thereafter consented to it and gave a quit-claim deed to the purchaser.

After the sale, the conciliation commissioner's report for distribution was approved by the District Judge after certain modifications, which do not affect the respondents herein. (Id. R. 137, 138).

Petitioner appealed from the District Court's order of May 26, 1949, approving the Conciliation Commissioner's Report (R. 76), including the claim of respondents Robert H. McNeill and Coleman C. Gore, and the court below affirmed those claims and found that petitioner, farmer-debtor-solicited these respondents to purchase the above claim then owned by petitioner's son, requested in writing

that they purchase those claims from his son who "has been actually more insistent that his (petitioner's son) claim be paid than the holders of the first deed of trust notes" (R. 67A); that "The records of this Court and of the Appellate Court (R. 134; 179 F 2d 848) will show that Mr. McNeill sought to obtain the delay desired by his client and he actually succeeded in staving off the final day for about 14 months" (R. 69, 134, the courts below).

The trial court found:

> "I fail to find any breach of trust or confidence on the part of the attorney toward his client. On the contrary, the services rendered by Mr. McNeill resulted in the delay for which the debtor was clamoring. Mr. McNeill was diligent and energetic in pursuing the course desired by his client and during the period offered to further subordinate his lien if a lender could be found who would refinance the debtor. It is my opinion that the note was purchased by McNeill and Gore at a time and under such circumstances as an outside person or lending institution would not ordinarily have been interested in acquiring the note. McNeill and Gore took a chance on purchasing this note and if this chance now results in a profit to them I see no reason why a profit should not be realized where the transaction was in good faith and fair and was entered into with the full knowledge, consent, acquiescence and on the suggestion of the debtor. I find nothing to criticize in the conduct of Mr. McNeill. The claim here discussed will be allowed in full." (R. 70)

The court below found, as did the District Court that,—

> "There was no fraud and no concealment in the business, but all of the facts were well known to the debtor. Indeed the claim was purchased" (by respondents McNeill and Gore) "with the debtor's knowledge and at his request and the price paid was the best that could be obtained after considerable effort had been made to sell the claim. * * *" R. 136; 179 F 2d 848).

"The facts in this case, as found by the District Judge, fall within these principles. The debtor was fully aware of all the pertinent facts. He was necessarily acquainted with the nature and value of the assigned claim and of the property by which it was secured. He well knew of the unsuccessful efforts that had been made to sell the claim for the amount for which McNeill and his associate paid for it, and he not only consented to the transaction but was anxious that it be effected. It follows that the decision of the court allowing the claim in full was correct, and must be sustained." (179 F 2d 848 pp. 858, 859; R. 137, 138)

ARGUMENT

Petitioner has failed to show by references to the record, any error in the trial and the District Court or the appellate courts' findings of fact.

The cases petitioner cites in his petition and brief are utterly foreign to the facts and issues in this case. These cases are where an agent, attorney or fiduciary official, *was guilty of fraud, or concealment in the dealings* with his principal or client, which facts, as found by the courts below in this case, are not involved. (R. 136; 67, 69).

(a) Petitioner's Reasons For Allowance of the Writ Are Without Merit.

Petitioner cites six cases in attempting to support his reasons why this writ should be granted (pp. 12, 13). As stated before, they are utterly foreign to the facts and law applicable to this case. Petitioner's cited cases involve fraud or concealment, or faiilure of consent, without solicitation, or request of the client or principal. Here there was no fraud or concealment, but open, generous and fair dealing, and there was a request and solicitation, with *petitioner's full knowledge of all the facts.* (R. 136, 67, 69).

Petitioner's statement as to "*Reasons For Allowance of the Writ*" (p. 11) i.e. that the "decisions of the Fourth Circuit are contrary to the decisions of Courts of Appeals in other Circuits, is grossly erroneous, and without any foundation in his cited cases.

(1) In *Niehart* v. *Bulk*, 50 F 2d [illegible], CCA 10, (cited by petitioner, p. 12), Niehart was Mills' attorney. Mills, 82 years old, weak and of unsound mind, gave a quit-claim deed to Niehart, who induced the mortgagors to reduce their claims on the farm on which he received the deed. The Court held that the acts of Niehart were fraudulent and that his client was the owner of the equity in the farm.

(2) In *Commonwealth Finance Corp* v. *McHarg*, 282 Fed. 560, CCA 2, McHarg was a director, secretary and treasurer and general counsel of the above corporation. McHarg had the corporation's stock sold to a third party "but in reality for himself. This court held (p. 563) that "* * * an agent who is authorized to sell his principal's property cannot, *without his principal's consent*, purchase the property for himself * * *". In that case it was held to be a dishonest scheme to defraud the client.

(3) Petitioner's next claim (p. 12) is that the Fourth Circuit decisions "run counter to the most solemn declarations of this Court upon the delicate and confidential relations between counsel and client and the duty of counsel and courts to see that they must be zealously guarded," citing

(4) *Texas* v. *White* (in re Paschal), 10 Wall. 483 (19 L. ed. 992), which has no application to the present case, as it applies to attorneys' liens, and clients rights to discharge attorneys and to recover their assets held by their attorneys if and when the clients pay for the services of their attorneys.

(5) *Stockton* v. *Ford*, 11 How. 232, 236 (cited by petitioner p. 12) was where the attorney purchased a judg-

ment against his client *"without communicating the fact to his client, and obtaining his consent."*

(6) *Michand* v. *Girod,* 4 How. 551 (cited by petitioner, p. 12) involved the purchase by the executor of the testator's estate, without consent, decided under the laws of Louisiana. Here the mortgage belonged to petitioner's son exclusively.

(7) *In Jackson* v. *Smith,* 254 U. S. 587 (cited by petitioner, p. 13) a receiver joined with two others, *under a secret agreement,* to purchase property under the receiver's control. This Court held that the estate was entitled to the profits resulting therefrom.

(b) Reply to Petitioner's Argument, (at p. 24)

Petitioner's statement of facts do not conform to the facts found by the Referee, the District Court or the court below, hence they should be disregarded, and as petitioner does not claim that either of the courts below made erroneous findings of fact, the facts here are necessarily limited to the findings made by the courts below. Nor does the record, in any way, contradict these findings.

The findings of the referee, the District Court, and the court below, should be left undisturbed, as there is an absence of clear mistake or error in any respect whatever. In fact *petitioner does not make the findings one of his Issues* (p. 2), or *The Questions Presented* (p. 9) or *Specification of Errors* (p. 19). *Welling* v. *General Industries Co.,* 330 U. S. 545, 550; *District of Columbia* v. *Pace,* 320 U. S. 698, 702). In *Muschany* v. *U. S.,* 324 U. S. 49, 57-58, this court held that since the trial court specifically made findings as to fraud, supported by substantial evidence "it is not for this court to undertake an independent examination of these issues. (Of course the reverse is equally true.) * * * *Therefore this case comes before this Court without any suggestions of fraud or unfairness such as would justify holding the contract invalid."* Such is the *universal rule.*

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A brief summary of the facts shows that Petitioner's only son, and heir, after being unable to sell his claim, involved here, first contacted respondent Gore, who tried ten prospects but was unable to obtain an offer for the claim (R. 67, 68, 95, 96). After this failure by Gore, petitioner asked respondent McNeill to request petitioner's son and wife to come to Mr. McNeill's office for a conference, which was held on February 3, 1948, at which time *petitioner* himself agreed in writing to purchase his son's claim for *$18,600 net* to his son, with a down payment and a certain sum each month thereafter. Petitioner, the following day, stated that he could not purchase the claim and requested respondents Gore and McNeill to purchase it *in order to place the claim in friendly hands, as his son was the most active party in attempting to have his father's property sold, even more so than the holders of the first deed of trust,* and in order to prevent criminal prosecution of his son for issuing certain checks which he did not have sufficient funds to pay (Opinion R. 67). So the agreement between petitioner and his son was cancelled. (R. 87, 88, 107, 108). Petitioner does not raise an issue as to the above facts nor to the fact that these respondents, *at petitioner's request,* purchased the said claim for the *same amount,* as Petitioner was to pay.

Petitioner claims (Brf. p. 25) that these respondents knew that the claim they purchased was worth one hundred cents on the dollar, and so advised petitioner, and that the claim would net a profit of 106%. This Court, as shown by its refusal of certiorari to Petitioner in *Littleton v. Rust,* 334 U. S. 833, as well as the courts below, and the parties able to purchase such a claim, knew that petitioner was a notorious litigant, not only in this bankruptcy case but in other cases over a period of many years. Petitioner had eighteen different lawyers up to the time this case as was stated by the Court below (Opinion p. 10, R. 127). Neither petitioner nor his son could sell the claim. *"For numerous reasons no person could be found who was interested in*

purchasing the note. (District Court Opinion quoted in Appeal Court Opinion, p. 16, R. 133). Petitioner's only interest was to get the claim out of his son's hands and into friendly hands, not only for his son's benefit but his own. Only through the actions of Messrs. McNeill and Gore could these results be accomplished—hence he urged them to buy.

Petitioner claims (Brf. pp. 26, 27) that there was no evidence that petitioner was present when these respondents purchased the claim,—when the contract was drawn and signed. *This statement is utterly contrary to all the evidence.* Petitioner makes the statement that Mr. McNeill's law partner, Mr. Fuller, testified that he (Fuller) was not sure whether petitioner was present when said contract was signed. The testimony shows that petitioner was present when he and his son and these respondents prepared the contract and that petitioner was given a copy of the contract, although said witness was not certain whether he was in the room when the contract was signed or was with this witness in the next room where they were working on a brief for petitioner, as petitioner would come and go from one room to the other, but that petitioner at that time was given a copy of the agreement (R. 108, 109). No part of this testimony was contradicted.

The findings of the courts below conclusively show that petitioner not only knew about the terms of the contract but that he solicited and requested these respondents, orally and in writing, to purchase said claim for the price they paid for it. (R. 132-138).

THE LAW

(Petitioner's brief pp. 27-33)

In each case cited by petitioner in his brief, the facts and law are utterly foreign to those in the present case, as heretofore shown in respondent's reply to petitioner's reasons for granting the Writ (pp. 5-7, supra). Counsel for

petitioner knew, or should have known, that the cases they cite and the facts therein are not applicable to the facts and law here, where there is no fraud, misrepresentation, or concealment of facts, and where the client was not only anxious, but earnestly solicited and requested in writing that these respondents purchase the claim held by his son.

The citation of the cases and facts in petitioner's brief are contrary to the evidence in this case. In fact, the circumstances there as so misstated and applied as to raise the question whether these citations are contrary to Canon 22, of Professional and Judicial Ethics, adopted by the American Bar Association require, Candor and Fairness in dealing with the courts.

Canon 6 (Id) makes an exception from the general rule, as to dealings between attorney and client, stating—

> "* * * except by *express consent of all concerned, given after a full disclosure of the facts.*" (As here).

A similar exception is stated in American Law Institute Agency, Secs. 390-392 p. 878-886—

> "One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him * * *" (Id. Se. 390, p. 878.) (See also p. 886, Sec. 392).

This Court in *Robertson* v. *Chapman,* 152 U. S. 673 (cited by petitioner) held that an attorney was at liberty to purchase property he recently sold for his client, where there was no concealment of facts and his client was notified of the sale; that it was not a case where the agent to sell affects a sale to himself under the cover of the name of another person, or where the agent acted without the knowledge or assent of his principal. In the case at bar, respondents did not purchase from petitioner, but from petitioner's son, at petitioner's solicitation and written request.

In *Stiers* v. *Hall*, 170 Va. 569, the Court held—

> "Although such transactions will be closely and carefully scrutinized, yet those which are obviously fair and just will be upheld, and the client is not entitled to absolute relief from such contract, unless it be shown that he suffered some injury through an abuse of confidence on the part of his attorney, 6 C. J. 686. This statement was approved in Sawyer v. Mathews, 166 Va. 177, 184 S. E. 232."

Vol. 7 C. J. S., Sec. 126, pages 961-962, states—

> "* * * there are numerous cases which appear to support the view that the rule against purchases by an attorney is not inexorable and that under proper circumstances such a purchase may be sustained where the attorney has not violated any confidence reposed in him nor *breach* his duty of fidelity. Hence, the purchase may be sustained where the attorney can satisfactorily show that he has acted with his client's consent and that the transaction was in *every* way fair and not to the client's prejudice or disadvantage. Also it has been held that the rule does not preclude a good-faith purchase by the attorney from a third person of a title which has previously belonged to the client."

As stated in 7 C. J. S. Sec. 126, p. 962—

> "Although an attorney has made a purchase which the client has a right to invalidate or claim for his benefit, under the rules stated in the preceding section, the purchase will usually be sustained in the attorney's favor if the client has by his acts or conduct ratified the same or waived his rights or estopped himself from questioning the attorney's title."

The general rule in 5 Am. Jur. Sec. 62 is—

> "EFFECT OF GOOD FAITH: If, however, the client intended that the attorney should make the purchase for himself and acquiesced in his action, the transaction will be upheld if open, honest and fair."

Judge Hutcheson, in making his findings in the District Court, stated that "The law almost universally recognizes

that the relationship of attorneys and client demands that the attorney occupy toward his client a high position of trust and confidence in his relations with his client, and in dealing with his client it is the lawyer's duty to exercise the utmost good faith, integrity, fairness and fidelity. *Byars et al* v. *Stone, et al*, 42 S. E. (2) 847 R. 66, 67). *He then found that Mr. McNeill had not only fulfilled each of the above requirements, but went beyond his duty to petitioner at petitioner's solicitation in joining in the purchase of the claim (a) in order to prevent criminal prosecution of petitioner's son* (Id. p. 66), (b) *to prevent the son from continuing to press for a* sale of petitioner's property (Id. 68), (c) to assist petitioner in borrowing money to rehabilitate himself and to subordinate these respondents' second deed of trust to whatever amount a lending institute might lend to debtor (Id. p. 69), and (d) in purchasing the claim at a time and under such circumstances as an outside person or lending institution would not ordinarily have been interested in acquiring the note, and in taking a chance (Id. p. 70) of losing their entire investment for the reasons heretofore stated. This serious danger and chance has continued from the time the claim was purchased and respondents are even now in danger of losing their security upon which they have borrowed heavily because of the protracted litigation by petitioner in which it is already involved. Respondents are further subjected to unnecessary heavy expenses unjustly caused by petitioner in their effort to collect, such as court costs and substantial counsel fees.

The evidence and findings of the courts, as heretofore stated, conclusively show that petitioner's statements in his brief are utterly unsupported and untrue. Although Mr. Gore testified that when the claim was purchased he thought the paper was sound and would be paid off, dollar for dollar, he testified that appellant's son could not sell it for less than one-half the amount of the claim, and he, Gore, could not sell for the son for any price (R. 91 95);

that there was an element of chance of the property's being bid in by the first (mortgage) holders (R. 93, 98); that the buildings were deteriorating and the personal property was in considerable deterioration on account of moisture and not having heat in the house; that he felt better after the sale as they were skating on pretty thin ice; that the papers were up as collateral to the Mortgage Finance Company of Alexandria, Va. for $6,000 which was in default and there was a lien on the note for $5,200 for counsel fees due Mr. Boothe, which had to be paid, to avoid foreclosure,—aside from the fact that the property securing the note was involved in this bankruptcy proceeding and that the maker of the note had the reputation of being difficult to deal with (Ct's. Fdg. R. 68).

Petitioner was present when the evidence was taken before the Conciliation Commissioner—acting as Referee—heard Messrs. Gore, McNeill and Fuller testify as to his full knowledge of every fact found by the Referee and the District Court, was challenged to take the stand and testify but remained mute. He now attempts to impeach this sworn, open-Court testimony, by an *ex parte* insinuation by a purported affidavit, that the facts duly sworn to, and judicially determined by the District Court and the Court below, were unwarranted. (R. 86, 105)

To permit such a statement to be given any weight whatever would violate every rule of judicial propriety and due process in legal procedure.

For seven years petitioner has litigated with his creditors to avoid and evade paying his admitted obligations—all as listed by him in his bankruptcy petition. He has kept unwarranted controversies before the United States District Court, the Court of Appeals and this Court throughout these many years.

(*Littleton* v. *Rust*, 166 Fed. 2d 1007, cert. den. 334 U. S. 833)

As to the claim here considered, petitioner listed it in his bankruptcy petition as due absolutely and in full, to his son. He claims no credit against the amount listed as due; (R. 84, 102) the son sold the claim *in which petitioner had no interest or property right, and was and is satisfied with the price he received.*

Not a word of evidence has been produced in the entire record before the Referee, the District Court, or the court below, even intimating that petitioner didn't fully *understand, request and approve the transaction.* (R. 53, 68, 137, 138)

Not a scintilla of evidence appears in the petition for certiorari showing that Messrs. Gore and McNeill paid less for the second mortgage than its market value—and—on the contrary—*the record shows they paid more than anyone else, including petitioner,* would pay, and risked losing all by collateral or attorneys' lien foreclosures. (R. 136-138; 67, 68)

These conclusions are uncontradicted facts, from the record, as determined by three judicial sources, the Referee, who heard all the witnesses, the District Court, who reviewed and approved the Referee's findings and the Circuit Court of Appeals, in its well-considered, and able, analytical opinion on all the questions now again presented.

INTEREST

In the case of voluntary proceedings in bankruptcy when the assets are more than sufficient to pay all claims in full, and interest thereon, as in the present case, interest is payable out of this surplus to the date of payment. (R. 123)

Johnson v. *Norris,* 5 Cir., 190 F. 459
New York v. *Saper,* 336 U. S. 328, p. 330, note &
American Iron Co. v. *Seaboard Air Line,* 233 U. S. 261

Miles v. *Lindell*, 8 Cir., 107 F. 2d 729
In re Hopkins, D. C. R. I., 15 F. 2d 206
In re Norcor Mfg. Co., E. D. Wisc., 36 F. Supp. 978
Brown v. *Leo*, 2 Cir., 34 F. 2d 127

CONCLUSION

When the cases cited by Petitioner are thoroughly examined it will be found that they have been used by Petitioner, in this case, with the really vital principles decided, omitted; and, we submit, that when the cases are read in their entirety, they sustain fully and uniformly every act of McNeill and Gore in their dealings with Petitioner's son in the *purchase from him* of an obligation of Petitioner, at a price *higher than Petitioner or anyone else would pay and upon the urgent request of Petitioner.*

The above conclusions being inescapable it would appear to be clear, beyond any doubt, that the petition for certiorari herein should be denied.

Respectfully submitted,

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Respondents

INDEX

PAGE

Reply to page 2: Middle of page of the Answer brief. That "Material Facts Herein" were presented to Chief Justice Vinson on April 3, 1950 2

Bottom of page 2 of Answer Brief. That respondent, attorney McNeill and his associate Gore, purchased for $18,600. claim "at petitioner's written request and for his benefit and upon his earnest solicitation and with his full knowledge of the purchase price and all the other attending circumstances" 2-3

Canon 10 of the American Bar Association, of the Bar Association of the District of Columbia, and of The Virginia State Bar 3-4

Reply to Page 3. Under "Statement" in Answer Brief 4

Bottom of Page 3. That the "Court below" found that petitioner as farmer-debtor "solicited" his attorney, McNeill, and his associate Gore, to purchase the claim of the creditor, and "requested" in writing that they buy it 4-5

Reply to Page 4 of the Answer Brief. That the purchase by an attorney of a claim against his client is not improper if;

(a) The attorney is diligent and energetic in pursuing the cause of the client;

(b) An outside purchaser would not be interested and the price is the best that can be obtained;

(c) The attorney takes a chance and reaps a profit;

(d) The transaction is in good faith and is entered into with full knowledge, consent and acquiescence and on the client's suggestion 5-6

Reply to pages 5 and 6 of Answer Brief 6-7-8-9-10

Reply to page 7 of Answer Brief. Section entitled "Reply to Petitioner's Argument" (at P. 24) 10-11

PAGE

Reply to page 8 of Answer Brief. Top of page 8 11-12-13
Bottom page 8 13-14

Reply to page 9 of Answer Brief. Paragraph in middle of page 14-15

Reply to pages 9 to 14 of Answer Brief 16-17-18

"THE LAW"

Reply to page 14 of Answer Brief "Interest" 18

CASES

A

B

Baker v. Schofield, 243 U. S. 114 16
Bruce v. Bibb, 129 Va. 45 16

C

Commonwealth Finance Corp. v. McHarg, 22 Fed. 560 7
Clark, Myra 14

D

District of Columbia v. Pace, 330 U. S. 698, 792 11

E

Erie v. Tompkins, 304 U. S. 64 16
Ex parte Whitney, 13 Pet 44 14

F

G

H

I

In re Myra Clark 14
In re Paschal (Texas v. White, 10 Wall 483 (not "19 L. Ed". but) 77 L. Ed. 992 8

J

Jackson v. Smith, 254 U. S. 587 9-10

K

L

PAGE

M

Michaud v. Girod, 4 How. 551 9
Muschany v. U. S., 324 49, 57, 58 11
Myra Clark 14

N

Niehart v. Buck, 90 F. 2d 367 7
New Orleans v. Gaines, Adm. 138 U. S. 595 14

O

P

Paschal, In re (Texas v. White), 10 Wall 483, 77 L. Ed. 992 8

Q

R

Robertson v. Chapman, 152 U. S. 693 16

S

Stiers v. Hall, 170 Va. 569 16
Stockton v. Ford, 11 How 232, 236 8

T

Texas v. White (In re Paschal), 10 Wall 483, 77 L. Ed. 992 8
Thomas v. Turner, 87 Va. 1 16

U

V

W

Welling v. General Industries, 330 U. S. 545, 550 10
Whitney, Ex parte, 13 Pet 44 14

TEXTS

Canon 10. "Canons of Professional Ethics" 3-4
1 Story "Equity Jurisprudence," Sec. 310 17

M

N

O

P

Q

R

S

T

V

W

In The

Supreme Court of the United States

October Term 1949

No. 746

FRANK CAMPBELL LITTLETON, *Petitioner,*

vs.

ROBERT H. McNEILL, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER IN REPLY TO ANSWER BRIEF OF ROBERT H. McNEILL AND COLEMAN C. GORE, RESPONDENTS

Note. This reply brief will discuss the subjects raised in the answer brief, in the order each is first mentioned, with an appropriate heading referring to the page of the answer brief being replied to.

All emphasis in this brief is supplied, except where it is otherwise stated.

Reply to

Page 2, Middle of Page, in the Answer Brief. (That the "Material Facts Herein" Were Presented to Chief Justice Vinson on April 3, 1950.)

The statements contained in the application for recall of the mandate were made to cover the subject matter and no more; the only issues and facts set out were those deemed pertinent to that application.

The "facts and issues" involved here are stated in the petition at pages 2 and 3, at pages 4 and 8, and in the petitioner's brief, at pages 15 to 19, and at pages 19 to 21.

It should be said that distribution of the funds has not been made.

> Page 2, bottom of page, in the Answer Brief (that respondents', Attorney McNeill, and his associate Gore, purchased the $18,600.00 claim, "at petitioner's written request, and for his benefit and upon his earnest solicitation, and with his full knowledge of the purchase price and all the other attending circumstances.")

This statement is not true.

(a) The "petitioner's request" (R. 84) was not *prepared by him, but by his attorney McNeill and McNeill's associate Gore,* or *by McNeill,* or *by Gore,* and presented to the petitioner Littleton for signature. See page 26 of petitioner's brief, first two full paragraphs, on page 26, which cites and quotes the record.

(b) The purchase was for the sole benefit of Frank C. Littleton, Jr., a creditor, not for the benefit of the petitioner herein, Frank C. Littleton, Sr. The creditor was in dire straits for ready cash. Gore's testimony: Answer at top of R. 87; "desperate need" of creditor; Gore's testimony at R. 84, end of third paragraph from bottom; "to protect young Frank"; R. 89, preceding ellipses; R. 92, second question and answer from bottom.

(c) The petitioner's earnest "solicitation" was not that his attorney should purchase the son's claim, but that the note should be changed from *non-negotiable* to *negotiable,* so it could be sold for the immediate benefit of the son. R. 21 and 22, paragraph numbered 2.

The petitioner had paid and entrusted large sums to his attorney, McNeill, and presumed that, as such attorney, McNeill would not deal in the claim against him, his client. R. 22, paragraph numbered 3.

(d) The petitioner did not, *at the time of the purchase* of the note, (principal $27,200.92 plus accrued interest) and judgment ($1,844.38) know that the purchase price was $18,600.00 payable in installments, nor did he know any of the circumstances.

He repeatedly kept at his attorney, McNeill, to tell him the facts and it was not until more than a year thereafter, on March 14, 1949, which was after the real estate security was sold, that he discovered them fully. R. 22, paragraph numbered 4, to R. 27, top of page. The correspondence between the petitioner and his attorney, McNeill, which is designated as Exhibits A, B, C, D, E, F, G, H, I, and J, is set out in full at R. 27 to 40.

The date of the purchase of the claim by Attorney McNeill, and his associate Gore, was February 5, 1948, R. 16. The date of the sale of the real estate was September 2, 1948. See statement in the answer brief at page 3 in the middle of the page. The date of the hearing at which the petitioner finally learned all of the facts was March 14, 1949. R. 85, middle of page under "Abstract of Testimony."

PROFESSIONAL "CANONS OF ETHICS"

CANON 10

Adopted in 1908 by the American Bar Association; adopted by the Bar Association of the District of Columbia; 171 Virginia XXII, Canon 10 of Canons of Ethics adopted and promulgated by the Supreme Court of Appeals of Vir-

ginia, October 21, 1938. The all-inclusive reply to the entire Answer Brief is Canon 10 of the Canons of Professional Ethics of the American Bar Association, the Bar Association of the District of Columbia, and of the Virginia State Bar.

"CANON 10. THE LAWYER SHOULD NOT PURCHASE ANY INTEREST IN THE SUBJECT MATTER OF THE LITIGATION WHICH HE IS CONDUCTING."

Reply to

Page 3, Under "Statement", in the Answer Brief. Middle of Page 3 of Answer Brief: (That "Although Petitioner at First Filed Objections to the Sale, He Soon Thereafter Consented to It and Gave a Quit-Claim Deed to the Purchaser.")

There is nothing in the record to substantiate the statement just quoted above and since it is lugged in, it may be said:

1. In this unfortunate case involving "Oak Hill" in which, as respondents say in the same paragraph, the real estate alone was sold for more than enough to pay all claims, with interest, all expenses of the proceeding and "leave a surplus" (of $23,595.47 R. 76, Item q, increased by the court of appeals to $27,262.60) by reducing a $3,727.13 claim of the conciliation commissioner to $60.00). The desperation of the farmer debtor to save his historic "Oak Hill" and its associated furnishings must be imagined.

2. It is a fact—though not in the record—, as respondents assert, that the petitioner entered into an agreement with the purchaser in which on his part, among other things, he signed a quit-claim deed and the purchaser entered into certain undertakings which the petitioner asserts were not performed and therefore the whole agreement was rendered void because of failure of consideration.

Bottom of page 3 of Answer Brief (that the "Court below" found that petitioner as "farmer-debtor") "solicited" his attorney, McNeill, and his associate Gore, to purchase the claim of the creditor and "requested" in writing that they buy it.)

The statement quoted is that of the district judge at R. 67-68, quoted in the opinion of the court of appeals at R. 129. There is no evidence in the record to support these conclusions. There is plenty of evidence that the *creditor,* the holder of the note, mortgage and judgment, "solicited" and "requested" that someone buy his claims. As to the farmer-debtor, the petitioner here, he did not request his attorney to buy them as is demonstrated at pages 12 and 13 of this reply brief.

Reply to Page 4 of the Answer Brief

That the purchase by an attorney of a claim against his client is not improper if:

(a) the attorney is diligent and energetic in pursuing the cause of the client;
(b) an outside purchaser would not be interested and the price is the best that can be obtained;
(c) the attorney takes a chance and reaps a profit;
(d) the transaction is in good faith and fair and is entered into with full knowledge, consent, acquiescence and on the client's suggestion.

We will briefly reply to each of these suggestions, leaving a fuller discussion to the following heading as suggested below.

(a) When an attorney agrees to represent a client in a cause he owes his best energy and diligence to the cause of his client. His compensation is the subject of agreement between them. Whether he is paid, or to be paid, anything or nothing, is immaterial. The obligations of an attorney to his client in a cause cannot be made contingent upon the attorney's right to speculate in the subject matters involved in the cause. Speculation and representa-

tion are utterly abhorrent to each other in such a relationship.

(b) That the attorney shops around a claim against his client and pays more than outsider would pay is foreign to the relationship of trust and confidence between attorney and client.

(c) Speculation, "taking a chance and reaping a profit" is recognized as legitimate in the stock market, but not within the office of attorney for a client within the client's cause. Here the attorney and his lay associate took no chance: they did not speculate. They knew they played the game for a sure thing, the claim for which they paid 48% being considered by them worth "100 cents on the dollar". See the references to statements made by the attorney and the lay associate at pages 25 and 26 of petitioner's brief.

(d) Good faith and fairness on the part of the attorney and knowledge, consent and even the suggestion of the client, as between guardian and ward, trustee and cestui que trust, are immaterial, but if they did not exist here as shown at pages 12 and 13 of this reply brief, and in the petitioner's brief at the bottom of page 26 and the upper two-thirds of page 27.

Because these suggestions in the answer brief are buttressed by the statements which immediately follow them in that brief they are replied to further under the next heading.

Reply to Pages 5 and 6 of the Answer Brief

Under "ARGUMENTS" the answer brief says that petitioner's citations are "utterly foreign" to this case, because the agent, attorney or fiduciary was guilty of "fraud or concealment, or failure of consent without solicitation or request" in the cited cases, and that six of them are "utterly foreign". We shall see what we shall see!

1. *Niehart v. Buek*, 50 Fed. 2nd 367, cited at pages 19 and 30 of petitioner's brief. There was no fraud or concealment, or failure of consent, there was agreement. The client in his old age entered into speculations and to support them put three mortgages on real estate up to its full value. After negotiation and full consideration the client agreed to convey the title subject to all liens in full settlement of all obligations for fees, all obligations against the mortgaged real estate and to be freed from any deficiency judgments. Upon the death of the client the courts held that the right to redemption was in the heirs of the client on *two* grounds, (1) the relation of attorney and client, and (2) the advanced age and weak mind of the client. The appellate court referred to the opinion of the district judge that "the relation between the parties being one of special confidence, trust and influence, prohibited Niehart [the attorney] from taking to himself under his claimed agreed with Mills [the client] all benefit and advantage that might be obtained out of the property in litigation."

2. *Commonwealth Finance Corp. v. McHarg*, 22 Fed. 560, CCA 2, cited at pages 19 and 30 of the petitioner's brief. McHarg was not general counsel for the corporation, but was the junior member of the law firm which was its legal counsel.

It is true that the court found the attorney to have been fraudulent and for that reason denied his claim to credit for all money he paid for the property and interest on it. This despite the fact that not he personally, but his law firm was the attorney for the client. In discussing the nature of the relationship of attorney and client the court observed page 564: "the relation is one of peculiar and exceptional confidence, so much so that the courts have held that *a gift made by the client to his attorney during the continuance of the relationship cannot be upheld but must be held to be absolutely void.*" . . . "Lord Erskine said that *independent of all question of fraud*, an attorney

cannot take a gift from his client while the relation subsists *though the transaction may not only be free from fraud, but the most moral in its nature.*"

After observing that it was unnecessary to inquire whether the rule relating to such a gift would be absolutely void under all circumstances, the opinion also observed that it referred to cases so holding "to show how scrupulously the courts have protected the client against the *possibility* of imposition and any unfairness, and how *uberrima fides has been exacted.*"

3. No case cited.

4. *Texas v. White,* (in re Paschal) 10 Wall, 483, (not "19 L. ed." but) 77 L. ed. 992. It is true that the present issue was not involved in this cited case, but this court, in discussing the reason why a client may discharge its attorney, remarked that "The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must suffer."

This exemplifies the fact that the recognition of the high character of the relation of attorney and client pervades all transactions between them.

5. *Stocton v. Ford,* 11 How. 232, 236. It is quite true that this cited case involved purchase by an attorney without knowledge and consent of his client (and without knowledge and consent Attorney McNeill and his associate Gore purchased the claim against McNeill's client in the instant case). But in discussing the all-pervading high and delicate trust and relationship between attorney and client, the court made the statement quoted in petitioner's brief at page 30 of that brief.

And this court went much further in its discussion of the obligations devolving upon an attorney for his client. It said: "a court of equity, from the mere fact of such

relation would fasten upon the purchase of a trust, *without any inquiry into the motives or intentions of the attorney in making the purchase,* and compel him to give up his benefits and advantages on the reimbursement of the purchase money. *Neither fraud nor imposition need be shown.* The client may at his election treat the act as done for his benefit."

6. *Michael v. Girod,* 4 How. 551. This case involved laymen, executors, who purchased their testator's estate. This court held they could not do so because they violated their office of trust as fiduciaries. An attorney in his relation to his client, is held to at least as high a degree of responsibility as any fiduciary. In the discussion of the case immediately following in this reply brief this court in 1920 unanimously applied the reasoning of the obligation of the fiduciaries in this *Michaud* case to an attorney and his associates who bought property involved in a client's cause.

So what this court said in the *Michaud* case in 1846, is still applicable to attorney McNeill and his lay associate Gore in 1950. Here are *some* of the observations of this court in the *Michaud* case:

Page 553: "Such a transaction carries fraud on the face of it." Page 557: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."

Page 557: "The inquiry, in such a case, is *not whether there was or was not fraud* in fact, the purchase is void." . . . "on the ground of the temptation." . . .

7. *Jackson v. Smith,* 254 U. S. 587.

(Correction. In petitioner's brief, at page 31, where this case is cited it is said that: "An attorney and *two laymen* joined in a venture to purchase property," which is incorrect. All three were lawyers.)

The answer brief states that in this case "a receiver joined with two others, *under a secret agreement,* to purchase property." (Emphasis is in the original.) There is no suggestion in the report of the case that there was any secrecy; it was all above board; the opinion refers to them as "associated" and as "confederating." As the general rule provides, an attorney who deals in his client's affairs must render the profits to his client whose representative he is. This court so held against the participants in the *Jackson* case.

In reaching its conclusion in the *Jackson* case this court said that when the receiver, Ambrose, and his attorney, Smith, and another, Wilson, agreed to make purchase, "he placed himself in a position in which his personal interests were, or *might be,* antagonistic to those of his trust." Citing as authority, the case of *Michaud v. Girod,* 4 How. 503, 552, in which there was no attorney-client relation involved, but only that of trustee to his testator's estate.

Reply to
Page 7 of Answer Brief, (Section Entitled "Reply to Petitioner's Argument) (at p. 24)"

There is no dispute as to the facts and no finding of facts is based upon any contradictory evidence. "THE FACTS" as set out beginning at page 24 of petitioner's brief, are all taken from undisputed documents in the record, or from statements made by Attorney McNeill, Mr. Gore, or their witness. We have studied the three decisions cited by respondents, McNeill and Gore, at page 7 of their brief, which are:

Welling v. General Industries Co., 330 U. S. 545, 550, which was a Wage and Hour case, subject to special statutory rules of procedure and evidence. This court did consider the evidence and was divided, three justices dissenting as to the conclusions to be drawn from the evidence.

District of Columbia v. Pace, 330 U. S. 698, 792, was a Tax Appeal case. As the opinion recites, "The provisions for review of Board of Tax Appeal decisions present complexities almost as baffling as the test of tax ability itself." It was another case subject to special statutory provisions. This court asserted the right to disturb any findings of fact.

Muschany v. U. S., 324 U. S. 49, 57-58, held that on the specific issue of fraud the two lower courts specifically found none and the question was not argued to this court and therefore was not considered.

The petitioner in this case does not say there was fraud by Attorney McNeill and his associate Gore in buying up a claim against him, McNeill's client. He clearly states the issue to be ("First Issue" page 2 of petition) in short whether an attorney may purchase a pending secured claim against his client, and thus become his client's creditor; ("Second Issue" same page) whether the attorney may pocket the profits from the investments; and ("Third Issue" same page) whether the attorney's associate may share in such profits.

It is not necessary that an attorney must proceed fraudulently to be forbidden to deal in the subject of his client's cause. If he wishes to speculate, or deal, in property involved in court, he must refrain from representing the party who owns it.

Reply to Page 8 of the Answer Brief

Top of page 8 of the Answer Brief: "Gore, who tried ten prospects." Some impression of the inaccuracy of respondents' statements may be gained by the following: R. 97. Gore himself testified that he tried to sell the claim to *six* people. Of these six one was Attorney Ahalt, Attorney for David Rust, a creditor; One was David Rust, the creditor; the four others are strangers to the record.

Middle of Page 8 of the Answer Brief: "PETITIONER DOES NOT RAISE AN ISSUE . . . to the fact that these respondents *at petitioner's request,* purchased the claim for the *same amount,* as Petitioner was to pay." (Italics in original; caps are supplied.)

Petitioner did *not* request McNeill and Gore to purchase the claim. Their assertion is founded upon the words "to purchase the same themselves" which are imbedded between other clauses in the next to the last paragraph of the long document, appearing at R. 84 and 85, directed "To Whom It May Concern".

That assertion is made in the face of the following categorical statements in petitioner's brief which are here merely summarized for reference to that brief:

Petitioner's brief page 25, 2nd paragraph:

1. McNeill and Gore were considering purchasing the claims *at least a month* before the "To Whom it may Concern" document of February 4, 1948. R. 84, R. 97, top of page:

2. McNeill and Gore knew the month before that document was drafted that they could get the claims for $18,600.00, exactly what they paid for them. R. 95; first two questions and answers.

Petitioner's brief page 26, second and third paragraphs:

3. The "To Whom it may Concern" document of February 4, was *prepared by either McNeill and Gore or by one of them.* It was not authored or drafted by petitioner. R. 89, italized paragraphed; R. 101, last full paragraph; R. 91, bottom of page; R. 22 tenth and eleventh lines.

4. Second paragraph:

The words "purchase the same themselves" were inserted in the next to the last paragraph of the "To Whom it may Concern" document between the clauses: "To

negotiate the loan against the above securities or a sale thereof to any clients to whom they may present the matter" and "Authority to proceed to sell the same on any terms that may be satisfactory to my said son." R. 85, top of page.

Bottom of page 8 of Answer Brief:

These respondents McNeill and Gore assert here that "This Court, as shown by its refusal of certiorari to Petitioner in *Littleton v. Rust,* 334 US 833, as well as the courts below, and the parties able to purchase such a claim, knew that Petitioner was a notorious litigant, not only in this bankruptcy case but in other cases over a period of *many* years" . . . "Petitioner had eighteen different lawyers" . . .

These quotations are another gauge of the standard of assertions by these respondents.

"Notorious litigant": Let them attempt to prove their gratituous assertions by searching tables of cases for the past *fifty* years! They will find only the case they cite and only the present one.

How this Court should know by denial by certiorari in 334 US 833 that petitioner is not worthy of consideration because he is merely a "notorious litigant" is not explained. What "this Court" and practitioners before it do know from its Rules and opinions is that this Court has repeatedly explained that denial of certiorari is *never* to be understood as affirmance of the decision below, or of agreement with the court which made it.

"Eighteen lawyers": To support this assertion these respondents McNeill and Gore cite R. 127, intending perhaps to refer to R. 124 where the appellate opinion quotes the district judge as making a statement that "the *Conciliation Commissioner* has found it necessary to deal with some eighteen different lawyers". The record will not support that statement. It no doubt will be judicially noted that the Honorable Sterling Hutcheson has been a

Federal district judge for a short period and so has not had extensive contact with this case which had its inception in June, 1941. Since then lawyers have died, entered the military or other government service, or been interested in but a single angle of the case. It is doubtful whether eighteen could be named even if every member of every firm and every law clerk whoever approached the conciliation commissioner for information on the Petitioner's behalf, were all counted.

History does record that Myra Clark was in this Court as a party at least eleven times over a period of more than forty years, beginning with Ex parte Whitney, 13 Pet. (1839) 44 until she finally obtained complete vindication and her estate in *New Orleans v. Gaines,* adm. (1891) 138 US 595, was awarded costs of litigation. The epithet of "notorious litigant" was hurled at her many times in state and federal courts during her indomitable pursuit of justice.

Reply to
Page 9 of the Answer Brief
(Paragraph at middle of page)

"This statement" (meaning the statement at page 26 of Petitioner's brief "there is no evidence that Mr. Littleton, Sr. was present when the contract of February 5, 1948 (R. 16) was drawn and signed) *"is utterly contrary to all the evidence".* (Emphasis is that of the original.)

"This statement" which they say is "utterly contrary to all the evidence" is quite well supported by the evidence cited and quoted at the bottom of page 26 of Petitioner's brief and the top of page 27. Gore says the contract was drafted in *Gore's* office. McNeill says it was drafted in *McNeill's* office. Fuller says he is not sure petitioner was present; that "to my knowledge" he received a copy; "I say I *thought* he received a copy". This is not evidence that petitioner was present, or that he received a copy.

Respondents say "No part of this tsetimony was contradicted." It was positively contradicted. By letter of March 24, 1948 (Exhibit A at R. 27-28) he requested information from Attorney McNeill about the contract saying "I believe you made some kind of a deal with my son". . . . The following day, March 25, McNeill wrote petitioner saying in the last paragraph "I thought you understood all of the terms of the deal, but I will be glad to show you all the papers". . . . R. 29 last paragraph before signature, "R. H. McNeill". On March 27th petitioner wrote McNeill: "I know nothing of what was actually done in the transaction with Frank". Last paragraph of letter Exhibit C at beginning of last paragraph at R. 30. In McNeill's letter of July 20, 1948 he tells the petitioner he is "sending you here with, as requested, full information about the second mortgage." Second paragraph of Exhibit F at R. 35, at bottom of page. No such data was enclosed in that letter or received by the petitioner. R. 24 bottom of page, in Debtor's Sworn Statement which begins at R. 21.

And so on by letters dated September 8th, September 21, September 25, October 4, petitioner continued to request information that was not forthcoming. See R. 25 paragraphs (g) to (j). Letters in full at R. 36 to 40, Exhibits G to J. It was not until October 8th that McNeill wrote that he owned a "half interest in the second mortgage which amounts to a total of over $37,000.00". See Debtor's or Sworn Statement at R. 26, top of page, second quoted paragraph. Full information did not come to him until March 14, 1949 when McNeill and Gore filed their Proof of Claim with the conciliation commissioner. R. 26, last paragraph preceding paragraph 5 and paragraph 5. (This Proof of Claim is at R. 12. Although the record states "filed April 13, 1949" that is the date of filing with the clerk. The Proof of Claim shows it was dated and sworn to on March 14 and the conciliation commissioner's report was filed with the clerk of the district court April 13. R. 47.)

Reply to
Pages 9 to 14 of Answer Brief

"THE LAW"

Page 10 of the Answer Brief:

Robertson v. Chapman, 152 US 693, was not "cited by Petitioner" but by Justice Brandeis in this court's opinion in *Jackson v. Smith,* 254 US 587, in support of that portion of the opinion saying that lawyer "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker v. Schofield,* 243 U. S. 114; *Robertson v. Chapman,* 152 U. S. 673, 681." It would be odd indeed if a case cited in its opinion by this Court should overrule the decision made in that opinion! *Jackson v. Smith,* 254 U. S. 587, still stands.

Page 11 of Answer Brief:

Stiers v. Hall, 170 Va. 569. It is sufficient to say that the contract between lawyer and client was set aside in that case. The Court said the *burden was on the lawyer* to show (1) the transaction was perfectly fair, (2) entered into by the client freely and (3) that it was entered into with full understanding of the nature and extent of his rights to enable the client to thoroughly comprehend the effect of the transaction. The Court held that the lawyer could not recover on the contract but should be paid per quantum meruit.

The Virginia court was applying the Virginia law, which of course under *Erie v. Tompkins,* 304 U. S. 64, is applicable here in this Virginia case arising in a federal court sitting in Virginia. A finding of fraud is not necessary. *Bruce v. Bibb,* 129 Va. 45, where the attorney was a lawyer of highest repute and the client and his successors continued to accept services under a contract, never objected to it though it was shown to him and he read it. *Thomas v. Turner,* 87 Va. 1, holding that the presumption of invalidity may only be overcome by the clear-

est and most satisfactory evidence. Virginia courts quote with approval Justice Story's analysis of the reason for strict watch over transactions over lawyer and client in which the lawyer goes outside his advocacy for his client and becomes interested in profiting out of the client's predicament. In 1 Story "Equity Jurisprudence", at Section 310, Justice Story said that the law "often interposes to declare transactions void which between other persons would be held unobjectionable".

Attorney McNeill never explained to his client the full implications of the purchase by him of a claim against his client and the policy of the law seriously to disapprove of it. On the contrary it was a long time before he explained to his client what he had done.

We think it has been made perfectly clear that Attorney McNeill and his associates knew they would be paid the full amount of the note and the judgment long before they bought them and that they knew they could buy them for half price from the improvident creditor long before they bought them.

In view of the mention of "$6,000.00" and "$5200.00" at the top of page 13 of the Answer Brief we do wish to make it perfectly clear that McNeill and Gore paid $18,600.00 and not a cent more for the claims which were ordered paid in the total sum of $38,440.27. R. 75, item (F). That they paid a total of only $18,600.00, see R. 98, Cross Examination of Gore: "Q And a consideration of $18,600.00 was paid for both the note and the judgment? A Yes, and accumulated interest.

We would notice also the implication that the courts should now overrule all of the strictures of American and English courts and of the most learned law writers through past generations against the mixing of a lawyer's duty to his client in a cause with that of an investor, seeking profits, in the affairs of his unfortunate client who has retained him to use his skill as an advocate to rescue the